Supreme Court, U. S.
FILED
FEB 25 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1309

JEFFREY COLE BIGELOW,

Appellant,

—v.—

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

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No. .....

JEFFREY COLE BIGELOW,

Appellant,

—v.—

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Virginia, entered on November 26, 1973, affirming his conviction of violating Section 18.1-63 of the Virginia Code by running in his newspaper an advertisement which contained information about abortion services in New York. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below

The *per curiam* opinion of the Supreme Court of Virginia, entered following the remand from this Court, is reported at 214 Va. 341, 200 S.E.2d 680 and is set forth in the Appendix, *infra*, at pp. 21a-22a. The order of this Court, vacating the earlier decision of the court below and remand-

ing for further consideration, is reported at 413 U.S. 909 and is set forth in the Appendix, *infra*, at p. 20a. The first opinion of the Supreme Court of Virginia is reported at 213 Va. 191, 191 S.E.2d 173 and is set forth in the Appendix, *infra*, at pp. 1a-11a. The judgment of conviction in the Circuit Court, Albemarle County, Virginia, filed July 15, 1971, is not reported, and is set forth in the Appendix, *infra*, at pp. 14a-15a.

Jurisdiction

The judgment of the Supreme Court of Virginia was entered on November 26, 1973, and a notice of appeal was filed in that court on December 20, 1973. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. Section 1257(2). The following decision sustains the jurisdiction of this Court to review the judgment by appeal in this case: *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

Statute Involved

Virginia Code, Section 18.1-63:

> If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor.

Questions Presented

1. Whether the conviction of a newspaper editor whose paper runs an advertisement containing information about abortion services violates the First Amendment to the Constitution?

2. Whether Virginia Code Section 18.1-63, prohibiting persons "by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner," from encouraging or prompting the procuring of an abortion, violates the First Amendment on its face or as applied in this case, and is vague and overbroad and thereby violates the First Amendment and the Due Process Clause of the Fourteenth Amendment?

Statement of the Case*

The Appellant, Jeffrey C. Bigelow, was a director, managing editor, and responsible officer of the Virginia Weekly, a newspaper published by the Virginia Weekly Associates of Charlottesville, Virginia, and distributed in the Charlottesville area.

On February 8, 1971, the Virginia Weekly, Volume V, No. 6, was published and circulated in Albemarle County, Virginia, and in particular on the grounds of the University of Virginia. The publication and circulation were the direct responsibility of the Appellant.

The February 8 issue carried the following advertisement on page 2:

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* The facts were stipulated by counsel in the trial court and constituted the record on appeal in the state courts, see App., *infra*, pp. 18a-19a.

UNWANTED PREGNANCY

LET US HELP YOU

Abortions are now legal in New York.
There are no residency requirements.

FOR IMMEDIATE PLACEMENT IN
ACCREDITED HOSPITALS AND
CLINICS AT LOW COST

Contact

WOMEN'S PAVILION
515 Madison Avenue
New York, New York 10022

or call any time

(212) 371-6670 or (212) 371-6650

AVAILABLE 7 DAYS A WEEK

STRICTLY CONFIDENTIAL. We will make
all arrangements for you and help you
with information and counseling.

On May 13, 1971, the Appellant was charged with violating Section 18.1-63 of the Code of Virginia which provided as follows:

> If any person by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor.[1]

[1] In 1972, that Section was amended to read as follows:

> If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or through the use of a referral agency for profit, or in any other manner, encourage or promote the processing of an abortion or miscarriage to be performed in this State which is prohibited under this article, he shall be guilty of a misdemeanor.

In July, 1971, a non-jury trial on stipulated facts was held in the Circuit Court for Albemarle County.[2] The only evidence consisted of the stipulation, the advertisement, and the June 1971 issue of Redbook Magazine, distributed in Virginia and in Albemarle County and containing abortion information (App., *infra*, pp. 18a-19a). After overruling Appellant's objections to the constitutionality of the statute, the Circuit Court found the Appellant guilty of violating the statute. He was sentenced to pay a fine of $500.00, with $350.00 of the fine suspended, conditional upon Appellant's not violating the statute in the future (App., *infra*, p. 15a).

Appellant timely noticed an appeal to the Supreme Court of Virginia, assigning as error the trial court's ruling that the statute applied to the advertisement, and the overruling of Appellant's First Amendment objections to that statute (App., *infra*, pp. 16a-17a).

Thereafter, the Supreme Court of Virginia granted review, and, in a 4 to 2 decision, upheld the constitutionality of Section 18.1-63 and its applicability to the advertisement in question. The Court first held that the advertisement did encourage or prompt the procuring of abortion within the meaning of the statute, and was not merely informational (App., *infra*, p. 3a). Second, the Court ruled that the prohibition of the statute could con-

[2] This *de novo* trial was technically an appeal from a proceeding held several weeks earlier in the Albemarle County Court, a non-record court.

stitutionally be applied to the newspaper advertisement because of the broad governmental power "to regulate commercial advertising," particularly in the medical health field (App., *infra,* pp. 3a-7a).[3] Finally, the Court ruled that the Appellant lacked standing to challenge the facial overbreadth of the statute because his First Amendment activity "was of a purely commercial nature":

> Thus, where, as here, a line can be drawn between commercial and non-commercial conduct and it clearly appears that the prohibited activity is in the commercial area, the actor does not have standing to rely upon the hypothetical rights of those in the non-commercial zone in mounting an attack upon the constitutionality of a legislative enactment. So we deny Bigelow standing to assert the rights of doctors, husbands, and lecturers. (App., *infra,* p. 10a).

The two dissenters found it unnecessary to determine whether the advertisement was "commercial" in the constitutional sense, because they concluded that the Appellant clearly had standing "to challenge as overbroad the criminal statute under which he was convicted" and that the statute "seeks to limit freedom of speech in a vague and impermissibly broad manner." (App., *infra,* p. 11a).

Thereafter, the Appellant filed a timely Jurisdictional Statement with this Court (No. 72-932). On June 25, 1973, the Court entered the following order:

[3] The stipulated facts contain no evidence to support the assumption below that both the advertisement and the advertiser were "commercial." The court so assumed because of the text of the advertisement and because of a discussion appearing in a subsequent issue of Appellant's paper.

> Judgment vacated and case remanded to the Supreme Court of Virginia for further consideration in light of Roe v. Wade, 410 U.S. 113, 35 L.Ed. 2d 147, 93 S. Ct. 705 (1973); and Doe v. Bolton, 410 U.S. 179, 35 L.Ed. 2d 201, 93 S. Ct. 739 (1973). *Bigelow* v. *Virginia,* 413 U.S. 909 (1973) (App., *infra,* p. 20a).

On November 26, 1973, without calling for further argument, the Supreme Court of Virginia entered a *per curiam* opinion once again affirming the Appellant's conviction. That Court reasoned that the abortion decisions were irrelevant to the issues here, since neither decision "mentioned the subject of abortion advertising" (App., *infra,* p. 22a). In the words of the court below:

> Bigelow's is a First Amendment case. He was convicted not of abortion but for running in his newspaper a commercial advertisement for a commercial abortion agency. We held that government regulation of commercial advertising in the medical-health field was not prohibited by the First Amendment. We find nothing in the new decisions of *Roe* v. *Wade* and *Doe* v. *Bolton* which in any way affects our earlier view. So we again affirm Bigelow's conviction (App., *infra,* p. 22a).

THE QUESTIONS ARE SUBSTANTIAL

I.

Virginia Code Section 18.1-63, Which Prohibits the Advertisement of Information Concerning Abortion Services, Violates the First Amendment on Its Face and as Applied in This Case.

By statute and criminal penalty, Virginia prohibits the dissemination of information which may "encourage" a woman to seek an abortion. As authoritatively construed by the Supreme Court of Virginia, this provision encompasses an advertisement in a newspaper advising Virginia residents of the availability of legal abortions in New York and offering to provide to interested women preliminary information and counseling. Virginia has thus undertaken to "contract the spectrum of available knowledge," *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965), to suppress the flow of information which would enable individuals to deal with "matters so fundamentally affecting a person as the decision whether to bear or beget a child," *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972), a decision which this Court has now held to be protected by the constitutional right of privacy, *Roe* v. *Wade*, 410 U.S. 113 (1973).

Virginia has done so, moreover, by punishing a newspaper editor in disregard of the First Amendment's free press guarantee. This Court has repeatedly held that the First Amendment guarantees the right to discuss freely and openly all matters of public concern. *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Martin* v. *Struthers*, 319 U.S. 141 (1943); *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). The

Court has also held consistently that newspapers are special beneficiaries of the First Amendment. *Near* v. *Minnesota*, 283 U.S. 697 (1931); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *New York Times Co.* v. *Sullivan*, *infra*; *Mills* v. *Alabama*, 384 U.S. 214 (1966); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). These two principles join in this case to cast grave doubt upon the decision of the Virginia courts sustaining the conviction of a newspaper editor because of the controversial content of material printed in his newspaper.

In 1971, when this advertisement appeared in Appellant's newspaper, abortion was an issue of great political, social, and moral debate, and it remains so today. Abortion laws have been the subject of intense controversy in the public forum, the legislatures, political campaigns and in the courts. Indeed, its controversial nature was explicitly recognized in the preface to this Court's decision in *Roe* v. *Wade*:

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion. 410 U.S. at 116.

Given this setting, the advertisement in question, disseminating information on a matter as controversial as the

availability of abortion information and services, clearly falls within the area of protected speech defined in *Thornhill* v. *Alabama*:

> Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. 310 U.S. at 102.

Moreover, since a woman's decision whether or not to terminate her pregnancy is encompassed by the constitutional right of privacy, *Roe* v. *Wade, supra,* it becomes particularly important that the dissemination of the kind of information contained in the advertisement be facilitated, not suppressed.

Notwithstanding the clear conclusion which should have been compelled by these First Amendment principles, buttressed by the rights recognized in *Roe* v. *Wade,* the Supreme Court of Virginia has once again approved the statute's sweeping prohibition on the publication of abortion information and upheld the Appellant's conviction under that statute. None of the reasons offered below can support such a result.

A. *The Commercial Advertising Doctrine Cannot Support the Appellant's Conviction.*

By invoking the talismanic phrase, "commercial advertising", the Supreme Court of Virginia has allowed the imposition of criminal punishment on a newspaper editor for publishing information of political and social importance, merely because it was imparted in the form of an advertisement and described services apparently available at a cost.

It is the Appellant's position that this advertisement, by virtue of its content and the controversy surrounding its subject matter, cannot be characterized as "commercial" speech and thus entitled to no First Amendment protection. But even assuming *arguendo* that such an advertisement does fall within that category, the Appellant submits that this Court must consider whether speech so labelled is nevertheless entitled to some constitutional protection.

This Court has consistently rejected state attempts to exclude categories of speech from the safeguards of the First Amendment by attaching labels to the kinds of expression involved. See *N.A.A.C.P.* v. *Button,* 371 U.S. 415 (1963); *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973) (hereafter, *Pittsburgh Press*). Rather, the Court has examined the content of the speech, affording protection to the expression of opinion or the communication of information, regardless of whether labels such as "solicitation" (*Button*) or "libel" (*Sullivan*) are sought to be applied to the speech. In this case, if the identical information—describing the legality of abortion in New York and identifying agencies from which further information could be obtained—had been contained in the text of a news article or editorial, the First Amendment would surely have protected appellant against conviction under the statute at issue. See *Pittsburgh Press, supra,* 37 L.Ed. 2d at 680. An artificial application of the commercial speech doctrine should not allow a different result here.

First, it is clear that ". . . speech is not rendered commercial by the mere fact that it relates to an advertise-

ment," *Pittsburgh Press, supra,* 37 L.Ed. 2d at 676, nor by the fact that the newspaper is paid for publishing the advertisement. *Ibid.; New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 266. Similarly, First Amendment protection cannot be withheld because the communication involves the solicitation of funds or because of the profit-making nature of the advertiser; the existence of "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg* v. *United States,* 383 U.S. 463, 474 (1966); *New York Times Co.* v. *Sullivan, supra; Smith* v. *California,* 361 U.S. 147 (1959); *Jamison* v. *Texas,* 318 U.S. 413 (1943).

Instead, this Court has indicated that the content of the advertisement must be examined to decide whether, on the one hand, it contains "purely commercial advertising" which does "no more than propose a commercial transaction . . ." *Pittsburgh Press, supra,* 37 L.Ed. 2d at 677; *Valentine* v. *Chrestensen,* 316 U.S. 52, 54 (1942), or, on the other hand, it ". . . communicate[s] information, express[es], opinion, recite[s] grievances, protest[s] claimed abuses . . ." or seeks financial support for an important social movement. *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 266. But the Court has not identified the criteria by which to determine where on the spectrum between these extremes a particular advertisement will be placed. In *Valentine,* where the commercial speech doctrine originated, the advertisement was a flyer announcing the sale of admission to a submarine on exhibit. In *Pittsburgh Press,* the classified advertisements were characterized as "no more than a proposal of possible employment" and thus "classic examples of commercial speech." 37 L.Ed. 2d at 677.

Here, by contrast, the advertisement contained much more than a proposal for a commercial transaction.

First, it explicitly provided the information that the law in New York had been changed, that abortions there were legal, and that no residency requirements were imposed. At the time the advertisement appeared, such information was vital to persons in Virginia attempting to deal with matters as fundamental " . . . as the decision whether to bear . . . a child." *Eisenstadt* v. *Baird, supra,* 405 U.S. at 453. Surely, such information ranks higher on the scale of First Amendment interests than does information about a submarine tour. See, *Associated Students for the University of California at Riverside* v. *Attorney General,* —— F. Supp. ——, 42 Law Week 2317 (C.D. Cal. 1973) (three-judge court) (holding unconstitutional the federal statute which prohibits the mailing of abortion information).

Similarly, the information that New York had legalized abortions was important not just to persons dealing with pregnancy, but to citizens in Virginia generally. The knowledge that one particular state had altered its laws on such a controversial subject as abortion is likely to have a substantial impact on the attitudes of persons concerning restrictive laws in their own state. Such realization, in turn, may prompt an individual to take steps to change the law. And thus, the statement that "Abortions are now legal in New York" has a direct potential for fueling the process of self-government which is at the heart of First Amendment concern. See, e.g., *Red Lion Broadcasting Co., Inc.* v. *F.C.C.,* 395 U.S. 367 (1969).

Finally, in the circumstances here, the very running of the advertisement can be deemed an implicit editorial endorsement of the legality of abortions and the availability of abortion information and services. The newspaper in

which the advertisement appeared was not a regular, establishment paper, but an "underground" paper, run by a "collective" whose staff members were expressly and openly concerned with the entire abortion issue (App., *infra*, p. 4a). The advertisement itself dealt with an issue which this Court has recognized as an extremely controversial one. Given the content and the context of this advertisement, it can be read as an implicit expression of editorial opinion on the subject matter involved.[4]

In short, to paraphrase the Court in *Pittsburgh Press*, the advertisement here resembles the one in *New York Times Co.* v. *Sullivan* more closely than the handbill in *Valentine* v. *Chrestensen*, and, therefore, cannot be categorized as "purely commercial advertising," beyond the pale of the First Amendment.

But even assuming that this advertisement, by virtue of the implication that the abortion services described involved the payment of a fee, can be categorized as "purely commercial advertising", then this Court must nevertheless consider whether such communication can completely and automatically be denied all First Amendment protection.

The Supreme Court of Virginia, relying primarily on *Valentine* v. *Chrestensen*, ruled that it could be. But *Valentine* was a special case, for not only did it involve advertising in the context of street solicitation, see also, *Breard* v. *Alexandria*, 341 U.S. 622 (1951), but it arose in the context of a contrived attempt to evade a municipal ordinance by the subsequent addition of a protest message to the back of

[4] By the same token, under these circumstances the decision to run this particular advertisement implicated the newspaper's editorial judgment and processes in a way that the decision on placement of employment advertisements in *Pittsburgh Press* did not. See 37 L.Ed. 2d at 677-78.

a business advertisement. The Court's brief, off-hand opinion did not articulate a rationale for the doctrine or indicate whether the presence of some non-commercial, ideational content would entitle the advertisement to some First Amendment protection. Nor has the course of the Court's decisions since then explicitly remedied the deficiency. See *Cammarano* v. *United States*, 358 U.S. 498, 513-14 (1959) (concurring opinion of Justice Douglas).[5]

The issue was raised but not resolved in *Pittsburgh Press*, where the newspaper argued that commercial speech should be accorded at least some constitutional protection. The Court's response was that whatever the argument's merit in other contexts, it was unpersuasive there because the advertisement, which facilitated prohibited sex discrimination in employment, was "not only commercial activity, it is *illegal* commercial activity. . . . " 37 L.Ed. 2d at 678. As the majority observed:

> Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity. *Id.* at 679.[6]

[5] Shortly after *Valentine* v. *Chrestensen*, in a series of cases involving the Jehovah's Witnesses, this Court carved out an exception from regulation for religious activities with a commercial aspect. *Martin* v. *Struthers*, 319 U.S. 141 (1943); *Jamison* v. *Texas*, 318 U.S. 413 (1943). Those cases appeared to limit the application of the doctrine to purely "commercial activity without any ideational content. But *cf.*, *Breard* v. *Alexandria*, 341 U.S. 622 (1951).

[6] The same analysis was employed in *Hunter* v. *United States*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972), heavily

In this case, by contrast, the information and services offered by the advertisement were not illegal and, indeed, have since been held to be constitutionally protected. With the obstacle of illegality absent, this case affords an appropriate opportunity for resolution of the issue left open in *Pittsburgh Press.*[7]

Moreover, resolution of the question is particularly important, and inflexible application of the commercial speech doctrine is particularly dangerous, where the medium regulated is a newspaper. With the exception of this Court's sharply divided decision in *Pittsburgh Press,* the Court has traditionally and consistently singled out newspapers for special First Amendment protection. See, e.g., *Near* v. *Minnesota,* 283 U.S. 697 (1931); *Grosjean* v. *American*

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relied upon by the court below. In *Hunter,* the commercial advertising doctrine was applied to justify an injunction against advertisements which violated federal statutory prohibitions against racial discrimination in housing. But there, as in *Pittsburgh Press,* the advertisement was not only purely commercial, but was an integral part of illegal conduct in violation of express, national, public policy.

[7] Several courts and commentators have urged that the rigid commercial speech doctrine employed below be relaxed to allow some First Amendment protection for advertising. For example, in *United States* v. *Pellegrino,* 467 F.2d 41 (9th Cir. 1972), the Court of Appeals observed:

> We cannot agree with the Government that advertising is devoid of literary, artistic or other social value and accordingly is less deserving of First Amendment protection than the substance of that which is advertised. Advertising performs an important First Amendment function in aid of communication. *Id.* at 45.

See also, *Hiett* v. *United States,* 415 F.2d 664, 672 (5th Cir.), *cert. denied,* 397 U.S. 936 (1970); see generally, Note, *Freedom of Expression in a Commercial Context,* 78 Harv. L. Rev. 1191 (1965); Redish, *The First Amendment in the Market Place: Commercial Speech and Values of Free Expression,* 39 Geo. Wash. L. Rev. 429 (1971).

Press Co., 297 U.S. 233 (1936); *Pennekamp* v. *Florida,* 328 U.S. 331 (1946); *New York Times Co.* v. *Sullivan, supra; Mills* v. *Alabama,* 384 U.S. 214 (1966); *New York Times Co.* v. *United States,* 403 U.S. 713 (1971). Thus, the reliance below on decisions employing the "commercial" speech doctrine in the area of television and radio broadcasting is misplaced. Decisions such as *New York State Broadcasters Association* v. *United States,* 414 F.2d 990 (2d Cir. 1969), *cert. denied,* 396 U.S. 1061 (1970); *Banzhaff* v. *FCC,* 405 F.2d 1082 (D.C. Cir. 1968); *cert. denied, sub nom. Tobacco Institute Inc.* v. *FCC,* 396 U.S. 842 (1969) and *Capital Broadcasting Co.* v. *Mitchell,* 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), *aff'd sub nom., Capital Broadcasting Co. et al.* v. *Acting Attorney General, et al.,* 405 U.S. 1000 (1972), were premised either on the federal government's broader power to regulate the electronic media or on a specific, historic congressional policy over the substantive problem, for example, the use of government regulated instrumentalities to conduct lotteries. These decisions merely reflect the distinctions between free print media and regulated electronic media; they cannot be invoked as the basis for suppressing the former.

To allow the commercial advertising doctrine to serve as the basis for sustaining the Appellant's conviction is to sanction "a disturbing enlargement" of that doctrine "and a serious encroachment on the freedom of press guaranteed by the First Amendment." *Pittsburgh Press supra,* 37 L.Ed. 2d at 681 (Burger, Ch. J., dissenting). If the doctrine is thought to allow criminal punishment of a newspaper editor for running an advertisement supplying information about medical services whose very provision was the subject of great controversy, then the continued vitality

of the commercial advertising exception from First Amendment protection must be re-examined.

B. *The State's Authority to Regulate in the Medical Health Field Cannot Sustain the Conviction.*

The Court below ruled that the power to regulate commercial advertising is "especially applicable where, as here, the advertising relates to the medical-health field." There is no quarrel that the state has the power to regulate the provision of medical services and advertising by those who provide such services. See, *e.g., Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608 (1935); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955). But the question, as always, is whether such regulation goes forward in a manner consonant with the First Amendment or other constitutional guarantees. In *NAACP* v. *Button, supra,* where Virginia relied on its authority to regulate an analogous area, the provision of legal services, the Court remarked:

> "... it is no answer ... to say that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." 371 U.S. at 438-39.[8]

[8] Cases involving advertising by opticians or dentists are somewhat inapposite, because such regulation usually applies to the profession, not to the press. In *Head* v. *New Mexico Board,* 374 U.S. 424 (1963), this Court upheld an injunction against a New Mexico newspaper and radio station, prohibiting advertisements of prices by a Texas optometrist. But this Court expressly refused to pass on the First Amendment issues because they had not been raised in the state courts, 374 U.S. at 432-33, n.12. See, *Pittsburgh Press, supra,* 37 L.Ed. 2d at 678, n.10.

Moreover, this Court's abortion decisions altered considerably the kinds of interests which the state can regulate in this particular aspect of the medical-health field. Now that the individual's decision with respect to abortion has been afforded systematic constitutional protection, the availability of information to help inform that decision becomes even more important. See *Associated Students for the University of California at Riverside* v. *Attorney General, supra.* Similarly, while *Roe* v. *Wade* recognized that the state has " . . . a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient," an interest which "extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise," 410 U.S. at 150, the statute here is not directed at securing those interests. It does not regulate those who perform abortions, it punishes those who provide information about abortion services.[9] Nor is the statute confined, as written or authoritatively construed, to those who provide such information and services for a fee; it would pro-

[9] The Court below relied, in part, on a New York statute regulating profit-making abortion service agencies. See, *S.P.S. Consultants, Inc.* v. *Lefkowitz,* 333 F. Supp. 1370, 1373 (S.D.N.Y. 1971). But there, the state Attorney General conceded that the statute did not prohibit the agency from disseminating information about abortion services or charging a fee for providing such information. 333 F. Supp. at 1372. All that was regulated was fee-splitting and referral services:

> Section 4401 does not prohibit the plaintiffs from disseminating information for a fee concerning the availability of health care facilities. It merely prohibits them from referring or recommending persons to a physician, hospital, health related facility, or dispensary for any form of medical care or treatment. 333 F. Supp. at 1376.

hibit an identical advertisement for a non-profit abortion information agency such as Planned Parenthood. The statute here reaches beyond the area of valid state interests and does so by means which lack the precision required when First Amendment rights are involved.

More particularly the statute and its application here run afoul of two First Amendment requirements. First, it draws no distinctions in terms of whether the abortion services are legal or illegal, within the state or outside it, or recommended by doctor or husband. In *Hiett* v. *United States,* 415 F.2d 664 (5th Cir.) *cert. denied,* 397 U.S. 936 (1970), the court held invalid, on First Amendment grounds, a statute which prohibited use of the mails to distribute information about obtaining a foreign divorce. The court ruled that the statute sought to prevent fraudulent divorces in a vague and uncertain manner which improperly prohibited valid legal consultation about a vitally important subject like the marital relationship. The statute here suffers comparable defects. And in *People* v. *Orser,* 31 Cal. App.3d 537, 107 Cal. Rptr. 458 (1st Dist. Ct. of App., 1973), a statute which prohibited the advertisement of abortion services was invalidated on similar grounds:

> Section 601, however, does not distinguish between abortions which are permitted and those which are not. Its broad language encompasses activity which is legal and activity which is illegal. By its terms it proscribes the advertising or publication of information concerning the obtaining of abortions permitted by law. It makes no distinction between the dissemination of advertising which is truthful and which calls attention to the means by which a legal abortion may be obtained and the advertising which calls attention to the means of obtaining an illegal abortion. 31 Cal. App.3d at 463.

Second, the application of the statute to this advertisement conflicts with the doctrine that speech may be prohibited only when there is an immediate danger that words will directly bring about the substantive evil which the state may prevent. See *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969). Here, the advertisement could not, in the First Amendment sense, incite a woman to obtain an abortion; it merely informs her where she can obtain additional information about abortions in another state. *Mitchell Family Planning Inc.* v. *City of Royal Oak,* 335 F. Supp. 738 (E.D. Mich. 1972) is directly in point. The court there invalidated, as violative of First Amendment principles, a Michigan ordinance used to prohibit billboard advertisements giving information about abortion services in New York. The information provided by the billboard, virtually identical with the advertisement here, did not pose an imminent danger to any valid state interest.[10]

[10] In this regard, it is interesting to note that the Ordinance in *Pittsburgh Press* did not apply to discriminatory advertisements placed in the paper by employers outside the City of Pittsburgh.

II.

Appellant Has Standing to Argue the Overbreadth of Virginia Code Section 18.1-63.

The overbreadth of this statute, simultaneously prohibiting expression which arguably can be proscribed and that which may not, is apparent. By its terms, it prohibits a speech urging that women have a right to obtain an abortion; it prevents a husband from discussing the possibility of an abortion with his pregnant wife; it prevents a Virginia doctor from suggesting that a patient obtain a legal abortion in Virginia or elsewhere; it suppresses abortion information supplied by a non-profit, non-commercial agency; in fact, it prohibits Appellant from writing and publishing an editorial which could be said to encourage abortion. It simply "sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Grayned* v. *City of Rockford*, 408 U.S. 104, 114 (1972). See, *Hiett* v. *United States, supra; People* v. *Orser, supra.*

The court below, explicitly refusing to give the statute a limiting construction, compare, *New York State Broadcasting Association* v. *United States, supra*, 414 F.2d at 997, held that because Appellant's activity was "commercial," he lacked standing to challenge the statute's overbreadth.[11] In reaching this conclusion, the Supreme Court of Virginia relied exclusively and improperly on *Breard* v. *Alexandria*, 341 U.S. 622 (1951). *Breard* involved an ordinance pro-

[11] The court did state *in dictum* that it would not interpret the statute to encompass some of the suggested hypothetical applications, but the holding rested on the conclusion that the Appellant lacked standing to raise these arguments (App., *infra*, pp. 9a-10a).

hibiting uninvited soliciting by door-to-door salesmen of magazine subscriptions. In response to a First Amendment challenge, this Court observed: "Only the press or oral advocates of ideas could urge this point. It was not open to the solicitors for gadgets or brushes." *Id.* at 641. Even under this reasoning, the Appellant, as a member of the press, was entitled to mount an overbreadth challenge to this statute.

More importantly, the decision below simply ignored this Court's contemporary overbreadth doctrine that one whose own conduct is not protected may nevertheless raise a challenge to an overly broad statute: "Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge." *Grayned* v. *City of Rockford*, 408 U.S. 104, 114 (1972). As the Court explained last Term, in the First Amendment area the normal standing rules are relaxed in order to enforce the requirement that statutes which regulate expression are narrowly and precisely drawn:

> Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression. *Broadrick* v. *Oklahoma*, —— U.S. ——, 37 L.Ed. 2d 830, 839-40 (1973).

And allowing an overbreadth challenge is particularly appropriate where, as here, the statute directly regulates expression.

Finally, the employment of an overbreadth analysis is not undermined by the recent change in the statute. The amendment in no way narrowed the reach of the statute, but simply added a prohibition on "the use of a referral agency for profit" to "encourage or promote the processing of an abortion. . . . " See, *supra*, pp. 4-5, n. 1. Virginia still provides that, "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, . . . or in any other manner, encourage or promote the processing of an abortion or miscarriage to be performed in this State which is prohibited under this article, he shall be guilty of a misdemeanor." And thus since Virginia still claims the authority to punish protected expression, "manifestly, strong medicine" must be administered. *Broadrick* v. *Oklahoma, supra*, 37 L.Ed. 2d at 841.

III.

The Decision Below Conflicts With Other Lower Court Rulings Invalidating Prohibitions on Providing Abortion information.

In at least four other cases, state and federal courts have invalidated enactments which prohibited the dissemination of information about legal abortion services.

In *Mitchell Family Planning, Inc.* v. *City of Royal Oak*, 335 F. Supp. 738 (E.D. Mich. 1972), the court invalidated, on First Amendment grounds, a local Michigan ordinance which prohibited billboard advertisements giving information about abortion services in New York. In *People* v. *Orser, supra*, a California appellate court employed a First Amendment analysis to overturn the convictions of persons who had placed abortion services advertisements in a local paper. Similarly, at least two cases have invalidated the federal statutory ban on using the mails to distribute information concerning abortions. In *The Comprehensive Family Planning and Theraputic Abortion Association, et al.* v. *Mitchell*, —— F. Supp. —— (W.D. Okla., No. Civ. 71-725, March 12, 1973), the District Court, following this Court's abortion decisions and on its own motion, determined that the issues no longer even required the convening of a three-judge court. More recently, a similar result was reached by a three-judge court in California which ruled that the mailing of unsolicited advertisements and information about contraceptives or abortions could not constitutionally be prohibited. *Associated Students for the University of California at Riverside* v. *Attorney General*, —— F. Supp. ——, 42 Law Week —— (C.D. Cal. 1973) (three-judge court). In that case, the Government did not even defend the constitutionality of the statute.

The conflict between these cases and the decision below require that jurisdiction be noted. Allowing this conviction to stand not only offends the First Amendment, but it also will have the effect of inhibiting the dissemination of information necessary for individuals to make those decisions about abortion which this Court has held to be constitutionally protected.

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

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February 25, 1974

• Attorneys for Appellant wish to thank Wayne Outten, a third-year student at New York University School of Law, for his assistance in the preparation of this Statement.

APPENDIX

Opinion of the Supreme Court of Virginia

Present:

Snead, C.J., I'Anson, Carrico, Harrison, Cochran, and Harman, JJ.

Richmond, Virginia, September 1, 1972

Record No. 7972

JEFFERY C. BIGELOW, ETC.

—v.—

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF ALBEMARLE COUNTY
David F. Berry, Judge

OPINION BY JUSTICE HARRY L. CARRICO

Jeffery C. Bigelow[1] was tried by the court, sitting without a jury, and convicted of encouraging or prompting the procuring of abortion by publication, advertisement, sale, or circulation of the Virginia Weekly, a newspaper published in Charlottesville, in violation of Code § 18.1-63. He was fined $500, $350 of which was suspended upon condition that he not further violate § 18.1-63. We granted him a writ of error.

The case comes before us upon a stipulation of fact and certain exhibits. Bigelow had direct responsibility for the publication and circulation in Albemarle County of the

[1] Also shown as *Jeffrey* C. Bigelow.

February 8, 1971 issue of the Virginia Weekly. The issue contained the following advertisement:

UNWANTED PREGNANCY

LET US HELP YOU

Abortions are now legal in New York.
There are no residency requirements.

FOR IMMEDIATE PLACEMENT IN ACCREDITED HOSPITALS AND CLINICS AT LOW COST

Contact

WOMEN'S PAVILION
515 Madison Avenue
New York, N. Y. 10022

or call any time

(212) 371-6670 or (212) 371-6650
AVAILABLE 7 DAYS A WEEK

STRICTLY CONFIDENTIAL. We will make all arrangements for you and help you with information and counseling.

The questions presented on this appeal are whether Bigelow violated Code § 18.1-63 by publishing the advertisement, and if so, whether the statute is constitutional under the First Amendment to the Constitution of the United States and Article 1, § 12, of the Constitution of Virginia.

Section 18.1-63, Code of 1950, as amended, 1960 Repl. Vol., provided:[2]

[2] Section 18.1-63 was amended by Acts of 1972, ch. 725, at 1019.

> "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor."

Bigelow first contends that the advertisement was not in violation of § 18.1-63. He says the advertisement did not encourage or persuade women to obtain abortions, but instead merely informed those who had already rejected their pregnancies that services were available for legal abortions. We do not agree. The language of the advertisement clearly exceeded an informational status when it offered to make all arrangements for immediate placement in accredited hospitals and clinics at low cost. It constituted an active offer to perform a service, rather than a passive statement of fact. By offering to arrange for the placement of pregnant women, the advertisement amounted to an encouragement or a prompting to procure an abortion, and thus was violative of the language and intent of Code § 18.1-63.

This brings us to the question of the constitutionality of Code § 18.1-63. Bigelow contends that the statute infringes the First Amendment rights of free speech and free press and is, therefore, unconstitutional.

We reject this contention. We are not dealing here with the traditional press role of disseminating information and communicating opinion, but with a commercial advertisement promoting the services of an abortion referral agency. That this is true is shown by the advertisement itself and by an exhibit which is in the record.

The advertisement holds out to pregnant women the offer, by the Women's Pavilion, to make all arrangements

and to secure immediate placement in a hospital or clinic for an abortion. All this, the advertisement says, will be done "at low cost." The printed words, whether read literally or rhetorically, can only mean that the agency, for a fee, will make the necessary business arrangements with doctors and hospitals or clinics to secure an abortion for the customer. Thus, the commercial nature of both the advertiser and the advertisement is patently revealed.

That is enough by itself, but an exhibit in the record in the form of one of the issues of the publication in question provides additional proof. The May-June, 1971 issue of the Virginia Weekly, in an article entitled "abortion rap," reported the arrest of staff members for publishing in the February issue the advertisement in dispute. In the same article, it was stated, in apparent apology, that the "*Weekly* collective has since learned that this abortion agency," obviously meaning the Women's Pavilion, "as well as a number of other commercial groups are charging women a fee for a service which is done free by Women's Liberation, Planned Parenthood, and others."

The question becomes whether such an advertisement may be constitutionally prohibited by the state. We answer the question in the affirmative.

In a case directly in point, *United States* v. *Hunter*, 459 F.2d 205 (4th Cir. 1972), the government sought to enjoin Hunter, a newspaper publisher, from carrying advertisements in his paper allegedly violative of a section of the Civil Rights Act of 1968, which prohibits advertising of an intent to discriminate in the sale or rental of a dwelling. 42 U.S.C. § 3604(c). The district court held that the Act did not contravene the First Amendment and that a court might, therefore, constitutionally enjoin a newspaper from

printing advertisements in violation of the statute. In affirming, the Fourth Circuit stated:

> "The [district] court's conclusion is supported by an unbroken line of authority from the Supreme Court down which distinguishes between the expression of ideas protected by the First Amendment and commercial advertising in a business context. It is now well settled that, while 'freedom of communicating information and disseminating opinion' enjoys the fullest protection of the First Amendment, 'the Constitution imposes no such restraint on government as respects purely commercial advertising.'" 459 F.2d at 211 (footnotes omitted).

In reply to Hunter's contention that the above rule did not apply to newspapers, the court stated that "a newspaper will not be insulated from the otherwise valid regulation of economic activity merely because it also engages in constitutionally protected dissemination of ideas." 459 F.2d at 212. And at another point the court said that if "an individual advertiser has no constitutional or statutory right to circulate a discriminatory housing advertisement, a newspaper can stand in no better position in printing that unlawful advertisement at the individual's request." 459 F.2d at 214.

Hunter is but one of numerous cases upholding the power of government to regulate commercial advertising. The source of authority for these decisions is *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942). In that case, the United States Supreme Court had before it the question of the constitutionality of a New York City ordinance which forbade distribution in the streets of commercial and business adver-

tising matter. Chrestensen had attempted to distribute a double-faced handbill, one side advertising an exhibit for profit and the other expressing protest against the city's efforts to thwart the exhibit. The police interfered with the distribution, and Chrestensen sought to enjoin Valentine, the police commissioner, from such interference. The district court granted the injunction, and the circuit court affirmed. However, the Supreme Court reversed, holding that the First Amendment imposed no restraint upon proscription by states and localities of purely commercial advertising and that it made no difference that one side of Chrestensen's handbill contained "matter proper for public information." 316 U.S. at 55.

Other cases upholding the right of government to regulate commercial advertising are: *New York State Broadcasters Ass'n* v. *United States,* 414 F.2d 990, 998 (2d Cir. 1969), *cert. denied,* 396 U.S. 1061 (1970); *Banzhaf* v. *F.C.C.,* 132 U.S. App. D.C. 14, 31-35, 405 F.2d 1082, 1099-1103 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Institute, Inc., et al.* v. *F.C.C.,* 396 U.S. 842 (1969); *Capital Broadcasting Company* v. *Mitchell,* 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), *aff'd sub nom. Capital Broadcasting Co. et al.* v. *Acting Attorney General et al.,* 405 U.S. 1000 (1972); *Wirta* v. *Alameda-Contra Costa Transit District,* 64 Cal. Rptr. 430, 434, 434 P.2d 982, 986 (1967).

The rule that the First Amendment does not prohibit government regulation of commercial advertising is especially applicable where, as here, the advertising relates to the medical-health field. *Patterson Drug Company* v. *Kingery,* 305 F. Supp. 821, 825 (W.D. Va. 1969) (three-judge court); *United Advertising Corp.* v. *Borough of Raritan,* 11 N.J. 144, 152, 93 A.2d 362, 366 (1952); *Planned*

Parenthood Committee v. *Maricopa County,* 92 Ariz. 231, 240, 375 P.2d 719, 725 (1962).

Regulations affecting advertising in the medical-health field have also been attacked on Fourteenth Amendment grounds. The attacks have been rejected. *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 490 (1955); *Semler* v. *Dental Examiners,* 294 U.S. 608, 610-11 (1935); *Patterson Drug Company* v. *Kingery, supra,* 305 F. Supp. at 823-25; *Ritholz* v. *Commonwealth,* 184 Va. 339, 369, 35 S.E.2d 210, 224 (1945); *Goe* v. *Gifford,* 168 Va. 497, 501-03, 191 S.E. 783, 784-85 (1937).

Focusing attention upon Code § 18.1-63, the statute here in question, we emphasize that it deals with abortion, a matter vitally affecting public health and welfare and in the important realm of medicine. It is clearly within the police power of the state to enact reasonable measures to ensure that pregnant women in Virginia who decide to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder. And the state is rightfully interested in seeing that Virginia women who do decide to have abortions obtain proper medical care and do not fall into the hands of those interested only in financial gain, and not in the welfare of the patient.

One need only look at the experience in New York State following its legalization of abortion to become convinced of the necessity for and the reasonableness of the advertising legislation in question. In *S.P.S. Consultants, Inc.* v. *Lefkowitz,* 333 F. Supp. 1373 (S.D.N.Y. 1971) (three-judge court), the court upheld, against First and Fourteenth Amendment attacks, a New York statute prohibiting the operation of for-profit abortion referral agencies. The opinion discloses that one such agency received from 200 to 400

telephone calls per day, mostly from out-of-state, and that 95 percent of the telephone calls of another agency came from nonresidents. One agency collected $5,500,000 in the first eight months after abortion was legalized, of which sum $1,200,000 was the agency's portion. There was evidence of substantial advertising by the for-profit agencies. One had an advertising budget of $1,000 a week and had carried advertisements in approximately 100 college newspapers throughout the country.

S.P.S. Consultants and two other New York cases, *State* v. *Mitchell*, 321 N.Y.S. 2d 756 (1971), and *State* v. *Abortion Information Agency, Inc.*, 323 N.Y.S. 2d 597 (1971), disclose that the for-profit agencies in New York were acting as middlemen for doctors, were soliciting patients for and splitting fees with doctors, and were engaging in the practice of medicine, all in violation of the law. The cases also show that the personnel of the referred agencies lacked medical training and that there was no "follow up procedure" after abortions were performed.

The *Mitchell* case from New York is interesting for another reason. The Martin Mitchell involved in that case apparently was the same Martin Mitchell who was also involved in *Mitchell Family Planning Inc.* v. *City of Royal Oak*, 335 F. Supp. 738 (E.D. Mich. 1972), a case relied upon here by Bigelow. In the Michigan case, the court struck down a city ordinance banning the advertising of "any information concerning the producing or procuring of an abortion," which is unlike the statute in question here. Mitchell had displayed an ad on a billboard merely offering "Abortion Information" and giving two New York telephone numbers, an advertisement quite different from the one published by Bigelow. The court stressed the fact that Mitchell's billboard offered only information, and its opinion indicated that the services to be offered by Mitchell were innocuous. But the New York case shows clearly the true nature of Mitchell's operation.

It is against the evils of such practices as are disclosed by the New York cases that the advertisement restriction in Code § 18.1-63 is designed to protect. This state has a real and direct interest in ensuring that the medical-health field be free of commercial practices and pressures, and we hold that Code § 18.1-63 is a reasonable measure directed to that purpose. *Semler* v. *Dental Examiners, supra,* 294 U.S. at 612-13.

This would conclude the question except for a further contention advanced by Bigelow that Code § 18.1-63 is unconstitutional because of overbreadth. Here, he argues that the statute not only encompasses non-protected expression, but in its overbreadth also sweeps within its scope speech which is clearly protected by the First Amendment. He says that the statute is so broad that a doctor who advises a patient that an abortion is appropriate, or a husband who encourages his wife to secure an abortion, or a lecturer who advocates a "right to abortion" would all be guilty of misdemeanors.

The Attorney General argues that Bigelow lacks standing to assert the hypothetical rights of others. Relying on *DeFebio* v. *County School Board*, 199 Va. 511, 514, 100 S.E.2d 760, 762-63 (1957), the Attorney General states that the applicable rule is that one who challenges the constitutionality of a statute must show that he himself has been injured or threatened with injury by its enforcement.

Bigelow insists that he does have standing and relies upon *Owens* v. *Commonwealth*, 211 Va. 633, 179 S.E.2d 477 (1971). There, we held unconstitutional on its face, because overbroad, the definition of unlawful assembly as contained in

Code § 18.1-254.1(c). The Attorney General contended in that case that Owens lacked standing to challenge the constitutionality of the statute. We said, citing *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432 (1963), that "where First Amendment liberties are involved, persons who engage in non-privileged conduct are not precluded from attacking a statute under which they were convicted." 211 Va. at 638-39, 179 S.E.2d at 481.

While we would not interpret Code § 18.1-63 to encompass the hypothetical situations posed by Bigelow, we need not rest our decision upon that ground. Instead, we hold that *Owens* and *N.A.A.C.P.* v. *Button* are not applicable here. As we have previously demonstrated, Bigelow's activity was of a purely commercial nature. This being so, the rule to be followed is that applied in *Breard* v. *Alexandria*, 341 U.S. 622 (1951). There, a door-to-door salesman of magazines was convicted under an ordinance of the city of Alexandria, Louisiana, which prohibited such a salesman from going in and upon private residences for the purpose of soliciting orders for the sale of goods without prior consent of the owners or occupants. The Supreme Court affirmed. In answer to the contention that the ordinance abridged First Amendment freedom of speech and press, the court stated: "Only the press or oral advocates of ideas could urge this point. It [is] not open to the solicitors for gadgets or brushes." 341 U.S. at 641.

Thus, where, as here, a line can be drawn between commercial and non-commercial conduct and it clearly appears that the prohibited activity is in the commercial area, the actor does not have standing to rely upon the hypothetical rights of those in the non-commercial zone in mounting an attack upon the constitutionality of a legislative enactment. So we deny Bigelow standing to assert the rights of doctors, husbands, and lecturers.

For the reasons assigned, the judgment of the trial court will be affirmed.

Affirmed.

I'Anson and Cochran, JJ., dissenting

We dissent. We conclude that § 18.1-63 is unconstitutionally vague and overbroad. In our view it is unnecessary to decide whether the advertisement is "commercial" in a constitutional sense. *See New York Times* v. *Sullivan*, 376 U.S. 254 (1964). In any event Bigelow has standing to challenge as overbroad the criminal statute under which he was convicted. *Owens* v. *Commonwealth*, 211 Va. 633, 179 S.E.2d 277 (1971). The language of the statute does not purport to regulate commercial advertising only but sweeps within its scope any person who "encourage[s] or prompt[s] the procuring of an abortion" by "publication, lecture, advertisement . . . or in any other manner." For this reason *Breard* v. *Alexandria*, 341 U.S. 622 (1951), a decision which upheld the validity of an ordinance which regulated the *conduct* of door-to-door solicitors rather than their freedom of speech, is inapposite here. Section 18.1-63 seeks to limit freedom of speech in a vague and impermissibly broad manner. Moreover, no distinction is made between legal and illegal abortions (an oversight recently remedied by amendment).

We would reverse the conviction.

Notice of Appeal

[Filed November 27, 1972]

IN THE

SUPREME COURT OF VIRGINIA

Record No. 7972

JEFFREY COLE BIGELOW,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

From the Circuit Court of Albermarle County

DAVID F. BERRY, Judge

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Jeffrey C. Bigelow, appellant in the above-stated case, hereby appeals to the Supreme Court of the United States from the final Judgment of the Supreme Court of Virginia entered on September 1, 1972.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

Date:

F. GUTHRIE GORDON, III
JOHN C. LOWE
1111 West Main Street
Charlottesville, Virginia 22903
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that copies of this Notice of Appeal were mailed, postage prepaid to Charles R. Haugh, Esquire, Commonwealth Attorney for Albemarle County, 435 Park Street, Charlottesville, Virginia, and Andrew P. Miller, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia 23219, on this 27th day of November, 1972.

/s/ F. GUTHRIE GORDON, III

Judgment of Conviction

VIRGINIA:

AT A CIRCUIT COURT HELD FOR THE COUNTY OF ALBEMARLE ON THE 15TH DAY OF JULY, 1971

APPEAL FROM COUNTY COURT #2483

COMMONWEALTH OF VIRGINIA

vs.

JEFFERY C. BIGELOW

Present:—Hon. David F. Berry

On this the 15th day of July, 1971 came the Attorney for the Commonwealth and the defendant, Jeffery C. Bigelow, and came also his attorney, John C. Lowe.

Whereupon the accused was arraigned and pleaded NOT GUILTY to the charge in said warrant.

And after being advised by the Court of his right to trial by jury, and the accused knowingly and voluntarily waived trial by jury and with the concurrence of the Attorney for the Commonwealth and of the Court, here entered of record, the Court proceeded to hear and determine the case without a jury and having heard the evidence and argument of counsel, doth find the accused guilty of "by publication advertisement, sale or circulation of the Virginia Weekly, encourage or prompt the procuring of abortion in violation of Sec. 18.1-63 of the Code of Virginia" as charged in the warrant.

The Court doth ADJUDGE and ORDER that the defendant pay, and the Commonwealth recover a fine of $500.00 and costs of $..... The Court doth however suspend $350.00 of said fine, conditioned upon no further violation of Section 18.1-63 of the Code of Virginia.

Thereupon, the defendant was allowed to depart.

DAVID F. BERRY, *Judge*

Notice of Appeal and Assignments of Errors

VIRGINIA:

IN THE

CIRCUIT COURT OF ALBEMARLE COUNTY

COMMONWEALTH OF VIRGINIA

v.

JEFFREY C. BIGELOW

To: MRS. SHELBY MARSHALL
Clerk, Circuit Court of Albemarle County
County Office Building
Charlottesville, Virginia

NOTICE OF APPEAL

Notice is hereby given that Jeffrey C. Bigelow, now standing convicted, will apply to the Supreme Court of Virginia for a Writ of Error to review and set aside his conviction of violation of Section 18.1-63 of the Code of Virginia as amended for urging or prompting the procuring of an abortion by publication and circulation of an advertisement in a newspaper in Albemarle County, Virginia, for which Jeffrey C. Bigelow was sentenced to a $500.00 fine.

ASSIGNMENTS OF ERROR

Now comes the Defendant, Jeffrey C. Bigelow, now standing convicted, and assigns as error in his conviction as stated above, the following:

1. The court erred in ruling that the abortion ad in the February 8 issue of the Virginia Weekly violated Section 18.1-63 of the Code of Virginia.

2. The Court erred in overruling Defendant's contention that Section 18.1-63 of the Code of Virginia is void under the Constitution of Virginia and the Constitution of the United States, and in particular is in violation of the First Amendment of the Constitution of the United States.

JEFFREY C. BIGELOW
By counsel

JOHN C. LOWE
Lowe and Gordon
1111 West Main Street
Charlottesville, Virginia 22903

Stipulation of Facts

VIRGINIA:

IN THE

CIRCUIT COURT OF ALBEMARLE COUNTY

COMMONWEALTH OF VIRGINIA

v.

JEFFREY C. BIGELOW

The following facts are stipulated for purpose of appeal in the above styled case:

Jeffrey C. Bigelow was a director, managing editor, and responsible officer of the Virginia Weekly, a newspaper published by the Virginia Weekly Associates of Charlottesville, Virginia, and distributed in the Charlottesville area.

On February 8, 1971, the Virginia Weekly Volume V, number 6, was published and circulated in Albemarle County, Virginia, and in particular on the grounds of the University of Virginia, which is in the jurisdiction of Albemarle County, and said publication and circulation were the direct responsibility of Jeffrey C. Bigelow.

The February 8 Issue of the Virginia Weekly carried an advertisement on page 2, which is in evidence in this case, and said ad is incorporated into this factual stipulation by reference thereto.

There is no contest on the factual issue of the printing of the advertisement. The only issue is in whether the advertisement violates Virginia law, and if so, whether Virginia law is unconstitutional.

Also in evidence is a June, 1971 issue of Redbook magazine, carrying abortion information from across the United States. Redbook magazine is distributed in Virginia and in Albemarle County.

F. GUTHRIE GORDON, III
Lowe and Gordon
1111 West Main Street
Charlottesville, Virginia
Counsel for
Jeffrey C. Bigelow

DOWNING L. SMITH
Downing L. Smith
Commonwealth's Attorney
for Albemarle County
301 County Office Bldg.
Charlottesville, Virginia

Remand Order of the United States Supreme Court

SUPREME COURT
OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 25, 1973

Melvin L. Wulf, Esq.
ACLU Foundation
22 East 40th St.
New York, N. Y. 10016

RE: BIGELOW v. VIRGINIA,
No. 72-932,

Dear Sir:

The Court today entered the following order in the above-entitled case:

> The judgment is vacated and the case is remanded to the Supreme Court of Virginia for further consideration in light of *Roe* v. *Wade*, 410 U.S. 113 (1973); and *Doe* v. *Bolton*, 410 U.S. 179 (1973).

Very truly yours,

MICHAEL RODAK, JR., *Clerk*

By /s/ HELEN TAYLOR, (Mrs.)
Assistant Clerk

D. PATRICK LACY, JR., Esq.
Asst. Attorney General of Va.
Supreme Court—Library Bldg.
1101 East Broad St.
Richmond, Va. 23219

Opinion of the Supreme Court of Virginia, on Remand

Present: All the Justices

Record No. 7972

JEFFERY C. BIGELOW, ETC.

—v.—

COMMONWEALTH OF VIRGINIA

PER CURIAM

Richmond, Virginia, November 26, 1973

UPON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

On September 1, 1972, this Court affirmed, by opinion, the conviction of Jeffery C. Bigelow for encouraging or prompting the procuring of abortion by an advertisement in the Virginia Weekly, a newspaper published in Charlottesville, in violation of Code § 18.1-63. 213 Va. 191, 191 S.E.2d 173.

On July 25, 1973, the Clerk of this Court received from the Supreme Court of the United States a copy of an order dated July 23, 1973, entered in the Bigelow case, voiding the judgment of this Court and remanding the case "for further consideration in light of Roe v. Wade, 410 U.S. 113 (1973); and Doe v. Bolton, 410 U.S. 179 (1973)."

The decision in *Roe* v. *Wade*, cited in the order of the Supreme Court, declared unconstitutional Texas statutes which made it a crime to procure, or to attempt to procure, an abortion. *Doe* v. *Bolton* declared unconstitutional portions of Georgia statutes making abortion a crime except in certain stated instances. Both decisions were grounded upon the Fourteenth Amendment. Neither mentioned the subject of abortion advertising.

Bigelow's is a First Amendment case. He was convicted not of abortion but for running in his newspaper a commercial advertisement for a commercial abortion agency. We held that government regulation of commercial advertising in the medical-health field was not prohibited by the First Amendment. We find nothing in the new decisions of *Roe* v. *Wade* and *Doe* v. *Bolton* which in any way affects our earlier view. So we again affirm Bigelow's conviction.

Affirmed

Notice of Appeal

[Filed December 20, 1973]

IN THE

SUPREME COURT OF VIRGINIA

Record No. 7972

JEFFREY COLE BIGELOW,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

FROM THE CIRCUIT COURT OF ALBEMARLE COUNTY
DAVID F. BERRY, *Judge.*

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Jeffrey C. Bigelow, the Appellant in the above stated case, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Virginia entered on November 26, 1973.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Date:

December 17, 1973

/s/ F. GUTHRIE GORDON, III

JOHN C. LOWE
1111 West Main Street
Charlottesville, Virginia 22903
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that copies of this Notice of Appeal were mailed, postage prepaid to Charles R. Haugh, Esquire, Commonwealth Attorney for Albemarle County, 435 Park Street, Charlottesville, Virginia, and Andrew P. Miller, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia 23219 on this 17th of December, 1973.

/s/ F. GUTHRIE GORDON, III

Supreme Court, U. S.
FILED
SEP 20 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1309

JEFFREY COLE BIGELOW,

Appellant,

—v.—

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT FILED FEBRUARY 25, 1974
JURISDICTION NOTED JULY 8, 1974

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NOTE: The following items appear in the Appendix to the Jurisdictional Statement in this case and are not reproduced here:

1. Opinion of the Supreme Court of Virginia of September 1, 1972.

2. Notice of Appeal and Assignments of Error to Supreme Court of Virginia - August 31, 1971.

3. Opinion of the Supreme Court of Virginia of November 26, 1973.

DOCKET ENTRIES

May 13, 1971	Warrant of Arrest Issued
May 27, 1971	Judgment of Conviction, Albemarle County Court: Appeal Noted to Albemarle County Circuit Court
July 15, 1971	Judgment of Conviction, Albemarle County Circuit Court
August 31, 1971	Notice of Appeal to Supreme Court of Virginia Filed in Circuit Court of Albemarle County
September 1, 1972	Judgment of Conviction Affirmed by Supreme Court of Virginia
November 27, 1972	Notice of Appeal to Supreme Court of United States Filed in Supreme Court of Virginia
November 26, 1973	Judgment of Conviction Reaffirmed by Supreme Court of Virginia
December 17, 1973	Notice of Appeal to Supreme Court of United States Filed in Supreme Court of Virginia

WARRANT OF ARREST

COMMONWEALTH OF VIRGINIA,
COUNTY OF ALBEMARLE, to-wit:

To the Sheriff of the County of Albemarle or any Police Officer

Whereas, Leon J. Podles, Jr. of said County, has this day made complaint and information on oath before me, D.D. Hudson,Jr. of said County, that Jeffery C. Bigelow in the said County on the 8 day of February,1971,did unlawfully by publication, advertisement, sale or circulation of the Virginia Weekly,encourage or prompt the procuring of abortion in violation of Sec. 18.1-63 of the Code of Virginia in violation of the laws of the Commonwealth of Virginia:

These are therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and bring before the Judge of said County, the body (bodies) of the above accused to answer said complaint and to be further dealt with according to law. You are also directed to summon the following witnesses to appear before said Judge at the hearing of said case on the 21 day of May, 1971.

Given under my hand and seal this 13 day of May 1971.

D. D. Hudson, Jr.

Stipulation of Facts

VIRGINIA:

IN THE
CIRCUIT COURT OF ALBEMARLE COUNTY

COMMONWEALTH OF VIRGINIA

v.

JEFFREY C. BIGELOW

The following facts are stipulated for purpose of appeal in the above styled case:

Jeffrey C. Bigelow was a director, managing editor, and responsible officer of the Virginia Weekly, a newspaper published by the Virginia Weekly Associates of Charlottesville, Virginia, and distributed in the Charlottesville area.

On February 8, 1971, the Virginia Weekly Volume V, number 6, was published and circulated in Albemarle County, Virginia, and in particular on the grounds of the University of Virginia, which is in the jurisdiction of Albemarle County, and said publication and circulation were the direct responsibility of Jeffrey C. Bigelow.

The February 8 Issue of the Virginia Weekly carried an advertisement on page 2, which is in evidence in this case, and said ad is incorporated into this factual stipulation by reference thereto.

Erratum
The continuation of the Stipulation of Facts will be found at p. 8.

Judgment of Conviction

VIRGINIA:

AT A CIRCUIT COURT HELD FOR THE COUNTY OF ALBEMARLE ON THE 15TH DAY OF JULY, 1971

APPEAL FROM COUNTY COURT #2483

COMMONWEALTH OF VIRGINIA

vs.

JEFFERY C. BIGELOW

Present:—Hon. David F. Berry

On this the 15th day of July, 1971 came the Attorney for the Commonwealth and the defendant, Jeffery C. Bigelow, and came also his attorney, John C. Lowe.

Whereupon the accused was arraigned and pleaded NOT GUILTY to the charge in said warrant.

And after being advised by the Court of his right to trial by jury, and the accused knowingly and voluntarily waived trial by jury and with the concurrence of the Attorney for the Commonwealth and of the Court, here entered of record, the Court proceeded to hear and determine the case without a jury and having heard the evidence and argument of counsel, doth find the accused guilty of "by publication advertisement, sale or circulation of the Virginia Weekly, encourage or prompt the procuring of abortion in violation of Sec. 18.1-63 of the Code of Virginia" as charged in the warrant.

The Court doth ADJUDGE and ORDER that the defendant pay, and the Commonwealth recover a fine of $500.00 and costs of $..... The Court doth however suspend $350.00 of said fine, conditioned upon no further violation of Section 18.1-63 of the Code of Virginia.

Thereupon, the defendant was allowed to depart.

DAVID F. BERRY, *Judge*

Notice of Appeal

[Filed November 27, 1972]

IN THE

SUPREME COURT OF VIRGINIA

Record No. 7972

JEFFREY COLE BIGELOW,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

From the Circuit Court of Albermarle County

DAVID F. BERRY, Judge

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Jeffrey C. Bigelow, appellant in the above-stated case, hereby appeals to the Supreme Court of the United States from the final Judgment of the Supreme Court of Virginia entered on September 1, 1972.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

Date:

F. GUTHRIE GORDON, III
JOHN C. LOWE
1111 West Main Street
Charlottesville, Virginia 22903
Attorneys for Appellant

Remand Order of the United States Supreme Court

SUPREME COURT
OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 25, 1973

Melvin L. Wulf, Esq.
ACLU Foundation
22 East 40th St.
New York, N. Y. 10016

RE: BIGELOW v. VIRGINIA,
No. 72-932,

Dear Sir:

The Court today entered the following order in the above-entitled case:

> The judgment is vacated and the case is remanded to the Supreme Court of Virginia for further consideration in light of *Roe* v. *Wade*, 410 U.S. 113 (1973); and *Doe* v. *Bolton*, 410 U.S. 179 (1973).

Very truly yours,

MICHAEL RODAK, JR., *Clerk*

By /s/ HELEN TAYLOR, (MRS.)
Assistant Clerk

D. PATRICK LACY, JR., Esq.
Asst. Attorney General of Va.
Supreme Court—Library Bldg.
1101 East Broad St.
Richmond, Va. 23219

There is no contest on the factual issue of the printing of the advertisement. The only issue is in whether the advertisement violates Virginia law, and if so, whether Virginia law is unconstitutional.

Also in evidence is a June, 1971 issue of Redbook magazine, carrying abortion information from across the United States. Redbook magazine is distributed in Virginia and in Albemarle County.

F. Guthrie Gordon, III
Lowe and Gordon
1111 West Main Street
Charlottesville, Virginia
Counsel for
Jeffrey C. Bigelow

Downing L. Smith
Downing L. Smith
Commonwealth's Attorney
for Albemarle County
301 County Office Bldg.
Charlottesville, Virginia

Notice of Appeal

[Filed December 20, 1973]

In the

SUPREME COURT OF VIRGINIA

Record No. 7972

Jeffrey Cole Bigelow,

Appellant,

v.

Commonwealth of Virginia,

Appellee.

From the Circuit Court of Albemarle County
David F. Berry, *Judge.*

Notice of Appeal to the
Supreme Court of the United States

Notice is hereby given that Jeffrey C. Bigelow, the Appellant in the above stated case, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Virginia entered on November 26, 1973.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Date:

December 17, 1973

/s/ F. Guthrie Gordon, III

John C. Lowe
1111 West Main Street
Charlottesville, Virginia 22903
Attorneys for Appellant

In The

Supreme Court of the United States

October Term, 1973

No. 73-1309

JEFFREY COLE BIGELOW,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

On Appeal from the Supreme Court of Virginia

MOTION TO DISMISS OR AFFIRM

ANDREW P. MILLER
Attorney General

ANTHONY F. TROY
Deputy Attorney General

D. PATRICK LACY, JR.
Assistant Attorney General

Supreme Court–Library Building
1101 East Broad Street
Richmond, Virginia 23219

Attorneys for Appellee

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In The

Supreme Court of the United States

October Term, 1973

No. 73-1309

JEFFREY COLE BIGELOW,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

On Appeal from the Supreme Court of Virginia

MOTION TO DISMISS OR AFFIRM

For the reasons hereafter stated, the Appellee respectfully submits that this Court should dismiss this appeal on the ground that it does not present a substantial federal question, or that this Court should affirm the judgment below on the ground that it is manifest that the questions on which the decision of this cause depend are so unsubstantial as not to need further argument.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia entered upon remand from this Court is reported at 214 Va. 341, 200 S.E.2d 680 and is set forth in the Appendix to Appellant's Jurisdictional Statement at pp. 21a-22a. The order

of this Court vacating the earlier decision of the court below and remanding the case for further consideration is reported at 413 U.S. 909 and is set forth in the Appendix to Appellant's Jurisdictional Statement at p. 20a. The earlier opinion of the Supreme Court of Virginia is reported at 213 Va. 191, 191 S.E.2d 173 (1972) and is set forth in the Appendix to Appellant's Jurisdictional Statement at pp. 1a-11a. The judgment of conviction in the Circuit Court, Albemarle County, Virginia, is not reported and is set forth in the Appendix to Appellant's Jurisdictional Statement at pp. 14a-15a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). The statement was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." U. S. Const. Amend. I.

* * *

"If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." Va. Code Ann. § 18.1-63.

QUESTIONS PRESENTED

1. Whether a state, exercising its police powers to protect the health, safety and welfare of its citizens, may prohibit commercial advertisements of commercial abortion referral agencies?

2. Whether a person, whose conduct was of a purely commercial nature and therefore within the hard core of activity prohibited by a statute and not protected by the First Amendment, has standing to raise the hypothetical rights of others who cannot possibly be affected because the statute, even prior to its amendment, was authoritatively construed to forbid only commercial activity?

STATEMENT

The Appellant was a director, managing editor and responsible officer of the Virginia Weekly, a newspaper distributed in the Charlottesville area. The February 8, 1971, issue of the Virginia Weekly, which was published and circulated in Albemarle County, Virginia, carried the following advertisement on page 2:

UNWANTED PREGNANCY
LET US HELP YOU

Abortions are now legal in New York.
There are no residency requirements.

FOR IMMEDIATE PLACEMENT IN ACCREDITED HOSPITALS AND CLINICS AT LOW COST

Contact

WOMEN'S PAVILION
515 Madison Avenue
New York, N. Y. 10022

or call any time

(212) 371-6670 or (212) 371-6650
AVAILABLE 7 DAYS A WEEK

STRICTLY CONFIDENTIAL. We will make all arrangements for you and help you with information and counseling.

The publication and circulation of the February 8th issue of the Virginia Weekly were the direct responsibility of the Appellant.

The Appellant was arrested on the charge of unlawfully encouraging or prompting the procuring of abortion in violation of § 18.1-63 of the Code of Virginia, which provided as follows:

> "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor."[1]

The Appellant was tried in the County Court of Albemarle County on May 27, 1971, found guilty and given a fine of $500.00, of which $350.00 was suspended. Thereafter, the Appellant appealed to the Circuit Court of Albemarle County where, on June 15, 1971, he was given a *de novo* trial before the Court, having waived his right to trial by jury. For purposes of appeal to the Circuit Court, the parties entered into a stipulation of facts. (App. 18a-19a.)[2]

The Circuit Court found the Appellant guilty and fined him $500.00, of which $350.00 was suspended on condition that the Appellant not violate § 18.1-63 again. (App. 15a)

An appeal to the Supreme Court of Virginia was later perfected and a writ of error was granted to review the proceeding. (App. 16a-17a.) The Appellant raised two issues

[1] Effective July 1, 1972, § 18.1-63 was amended and now provides:

> "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or through the use of a referral agency for profit, or in any other manner, encourage or promote the processing of an abortion or miscarriage to be performed in this State which is prohibited under this article, he shall be guilty of a misdemeanor."

[2] Appendix references are to the Appendix to the Appellant's Jurisdictional Statement.

before the Supreme Court of Virginia: (1) whether the advertisement in question violated § 18.1-63 of the Code of Virginia and (2) whether § 18.1-63 was violative of the First Amendment either as applied or because it was overly broad.[3] (213 Va. at 193, 197, 191 S.E.2d at 174, 177; App. 3a and 9a.) That court rejected both contentions. First, it held that the advertisement "clearly exceeded an informational status" and "constituted an active offer to perform a service," and thus violated both the letter and intent of § 18.1-63. (213 Va. at 193, 191 S.E.2d at 174; App. 3a.)

Next, the court below held that the statute as applied did not violate the Appellant's First Amendment rights and stated: "The printed words, whether read literally or rhetorically, can only mean that the agency, for a fee, will make the necessary business arrangements with doctors and hospitals or clinics to secure an abortion for the customer. Thus, the commercial nature of both the advertiser and the advertisement is patently revealed." (213 Va. at 193, 191 S.E.2nd at 174-175; App. 4a.)

In authoritatively construing § 18.1-63, the Supreme Court of Virginia stated (213 Va. at 196-97, 191 S.E.2d at 176-77; App. 7a, 9a):

> "Focusing attention upon Code § 18.1-63, the statute here in question, we emphasize that it deals with abortion, a matter vitally affecting public health and welfare and in the important realm of medicine. It is clearly within the police power of the state to enact reasonable measures to ensure that pregnant women in Virginia who decide to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder. And the state is rightfully interested in seeing that Virginia

[3] The appellant did not press claims based upon the Ninth Amendment or the Vagueness Doctrine under the Fourteenth Amendment in either of the courts below.

women who do decide to have abortions obtain proper medical care and do not fall into the hands of those interested only in financial gain, and not in the welfare of the patient."

* * *

"It is against the evils of such practices as are disclosed by the New York cases that the advertisement restriction in Code § 18.1-63 is designed to protect. This state has a real and direct interest in ensuring that the medical-health field be free of commercial practices and pressures, and we hold that Code § 18.1-63 is a reasonable measure directed to that purpose. *Semler* v. *Dental Examiners, supra*, 294 U.S. at 612-13."

Finally, in refusing to strike down the statute as being violative of the First Amendment due to overbreadth, the Supreme Court of Virginia rejected Appellant's claim that § 18.1-63 is so broad "that a doctor who advises a patient that an abortion is appropriate, or a husband who encourages his wife to secure an abortion, or a lecturer who advocates a 'right to abortion' would all be guilty of misdemeanors." (213 Va. at 197-98, 191 S.E.2d at 177; App. 9a-10a.) The statute, as thus construed by the Supreme Court of Virginia, relates only to commercial solicitations for abortion services.

Thereafter, the Appellant filed a Jurisdictional Statement and the Appellee filed a Motion to Dismiss or Affirm with this Court (No. 72-932). This Court vacated the judgment and remanded the case to the court below for further consideration in light of *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973). (413 U.S. 909; App. 20a.) Upon remand, the Supreme Court of Virginia again affirmed the Appellant's conviction and stated, (214 Va. at 342, 200 S.E.2d at 680; App. 22a):

"Bigelow's is a First Amendment case. He was convicted not of abortion but for running in his newspaper a commercial advertisement for a commercial abortion agency. We held that government regulation of commercial advertising in the medical-health field was not prohibited by the First Amendment. We find nothing in the new decisions of *Roe* v. *Wade* and *Doe* v. *Bolton* which in any way affects our earlier view. So we again affirm Bigelow's conviction."

ARGUMENT

The Questions Are Unsubstantial.

I.

A State, Exercising Its Police Powers To Protect The Health, Safety And Welfare Of Its Citizens, May Prohibit Commercial Advertisements Of Commercial Abortion Referral Agencies.

This case does not involve a woman's constitutionally protected right to terminate her pregnancy by abortion. *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973). Nor does it involve the traditional role of newspapers of communicating information and disseminating opinion. The evidence abundantly shows, and the Supreme Court of Virginia so found, that the advertisement in question is purely commercial in nature and that the advertiser is a commercial abortion referral agency. (213 Va. at 193-94, 191 S.E.2d at 174-75; App. 3a-4a.) And, as the Court also found, § 18.1-63 was enacted pursuant to the police power of the State to protect the health, safety and welfare of its citizens by ensuring that the medical-health field was free of commercial practices and pressures and that pregnant women obtain proper medical care. (213 Va. at 196-97, 191 S.E.2d at 176-77; App. 7a-9a.) To this end, the Supreme Court of Virginia construed § 18.1-63 to prohibit commercial solicitation of abortion services, including commercial advertisements by commercial abortion referral agencies. (213 Va. at 193, 196, 198, 191 S.E.2d at 174, 176-77; App. 3a, 9a-10a.) Thus, contrary to Appellant's conten-

tions, this case concerns only the authority of a state to regulate commercial advertising in the medical-health field. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955); *Semler* v. *Dental Examiners*, 294 U.S. 608 (1935).

The authority of a state to regulate commercial advertising has been consistently and uniformly upheld in the face of First Amendment attacks. *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973); *Valentine* v. *Christensen*, 316 U.S. 52 (1942); *New York State Broadcasters Association* v. *United States*, 414 F.2d 990 (2nd Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); *Banzhof* v. *FCC*, 405 F.2d 1082 (1968), *cert. denied, sub nom., Tobacco Institute, Inc.* v. *FCC*, 396 U.S. 842 (1969); and *Capital Broadcasting Co.* v. *Mitchell*, 333 F.Supp. 582 (D. D.C. 1971), *aff'd sub nom., Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U.S. 1000 (1972). While "freedom of communicating information and disseminating opinion" is entitled to the fullest First Amendment protection, "the Constitution imposes no such restraint on government as respects purely commercial advertising." *Valentine* v. *Christensen, supra*, at 54. Of course, "a newspaper will not be insulated from the otherwise valid regulation of economic activity merely because it also engages in constitutionally protected dissemination of ideas." *United States* v. *Hunter*, 459 F.2d 205, 212 (4th Cir. 1972), *cert denied*, 409 U.S. 934.

That the State has authority under its police power to protect the public health, safety and welfare of its citizens by prohibiting various modes of commercial advertising in the medical-health field is manifest. *Williamson* v. *Lee Optical Co., supra; Semler* v. *Dental Examiners, supra.* This the Appellant concedes (Jurisdictional Statement, p. 18): "There is no quarrel that the state has the power to regulate the provision of medical services and advertising by

those who provide such services." Moreover, while in both *Williamson* and *Semler* the advertisements were proscribed, the services advertised were legal. See *New York State Broadcasters Ass'n.* v. *United States, supra.*

Even in instances when abortions are legal, abortion referral agencies have been found to be soliciting patients for and splitting fees with doctors, *State* v. *Mitchell*, 321 N.Y.S.2d 756, 761 (1971), and to be acting as brokers in the sale of professional services, and even to be engaging in the practice of medicine. *State* v. *Abortion Information Agency, Inc.*, 323 N.Y.S.2d 597, 600-01 (1971). Obviously, advertising is the backbone of these abortion referral agencies. *S.P.S. Consultants, Inc.* v *Lefkowitz*, 333 F.Supp. 1373, 1377 (S.D. N.Y. 1971) (three-judge court). It was in light of these practices, which are demonstrably inimical to the public health, safety and welfare, that the Supreme Court of Virginia found that the advertisement restriction in § 18.1-63 was directed to "ensuring that the medical-health field be free of commercial practices and pressures" and to preventing "the evils of such practices as are disclosed by the New York cases." (213 Va. 197, 191 S.E.2d at 177; App. 9a.) See *Semler* v. *Dental Examiners, supra*, at 612-13.

II.

A Person, Whose Conduct Was Of A Purely Commercial Nature And Therefore Within The Hard Core Of Activity Prohibited By A Statute And Not Protected By The First Amendment, Does Not Have Standing To Raise The Hypothetical Rights Of Others Who Cannot Possibly Be Affected Because The Statute, Even Prior To Its Amendment, Was Authoritatively Construed To Forbid Only Commercial Activity.

The Appellant contends that he has standing to raise the hypothetical rights of others in challenging § 18.1-63 under the First Amendment as being overly broad. "He says that the statute is so broad that a doctor who advises a patient

that an abortion is appropriate, or a husband who encourages his wife to secure an abortion, or a lecturer who advocates a 'right to abortion' would all be guilty of misdemeanors." (213 Va. at 197, 191 S.E.2d at 177; App. 9a.) Application of the overbreadth doctrine in the context of this case, however, is unwarranted and improper.

The Appellant does not have standing to raise the hypothetical rights of others since his conduct in publishing and distributing a commercial advertisement for an abortion referral agency was squarely within the hard core of commercial activity prohibited by the statute and was not entitled to First Amendment protection. *United States* v. *Thirty-seven Photographs,* 402 U.S. 363, 378 (1971) (Harlan, J. concurring); *Breard* v. *City of Alexandria,* 341 U.S. 622 (1951). Moreover, facial overbreadth should not be invoked here because the Supreme Court of Virginia has placed a limiting construction on the challenged statute. *Broadrick* v. *Oklahoma,* 413 U.S. 601, 613 (1973). Authoritatively construing § 18.1-63, cf. *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942), the court below refused to give the statute a construction which would make it applicable to doctors advising patients, husbands encouraging wives to secure an abortion, or lecturers advocating the right to an abortion. Rather, it construed the statute to apply only to commercial solicitation of abortion referral services. (213 Va. at 198, 191 S.E.2d at 177: App. 9a-10a.)[4]

[4] The Appellant relies upon *Mitchell Family Planning, Inc.* v. *City of Royal Oak,* 335 F.Supp. 738 (E.D. Mich. 1972). His reliance upon *Mitchell,* however, is wholly misplaced. The city ordinance in that case banned the advertising of *"any information* concerning the producing or procuring of an abortion." (Emphasis added.) Furthermore, the advertisement in question in that case referred solely to information concerning abortion and did not contain any language which could have been construed as a solicitation on the part of a referral agency. *Mitchell* is manifestly inapposite.

Furthermore, as previously noted, *supra,* p. 4, n. 1, the statute under which the Appellant was convicted has been drastically amended. Therefore, this is not a situation in which "the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights," *Coates* v. *City of Cincinnati,* 402 U.S. 611, 620 (1971) (White, J., dissenting), if indeed, it ever did. A blind application of the overbreadth doctrine in this case could not conceivably affect the rights of anyone not before the court.

CONCLUSION

For the reasons set forth above, Appellee respectfully submits that the appeal should be dismissed or the judgment affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, D. Patrick Lacy, Jr., Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of counsel for the Commonwealth of Virginia in the above captioned matter, hereby certify that three (3) copies of this Motion to Dismiss or Affirm have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office with first class postage prepaid, this the 27th day of March, 1974, as follows:

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Supreme Court, U. S.
FILED
SEP 18 1974
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1309

JEFFREY COLE BIGELOW,

Appellant,

—v.—

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

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In The

Supreme Court of the United States

October Term, 1974

No. 73-1309

Jeffrey Cole Bigelow,

Appellant,

-v.-

Commonwealth of Virginia,

Appellee.

On Appeal From the
Supreme Court of Virginia

BRIEF FOR APPELLANT

Opinions Below

The per curiam opinion of the Supreme Court of Virginia, entered following the remand from this Court, is reported at 214 Va. 341, 200 S.E.2d 680 and is set forth in the Jurisdictional Statement [hereinafter J.S.], at pp. 21a-22a. The order of this Court, vacating the earlier decision of the

court below and remanding for further consideration, is reported at 413 U.S. 909 and is set forth at J.S. 20a. The first opinion of the Supreme Court of Virginia is reported at 213 Va. 191, 191 S.E.2d 173, and is set forth at J.S. 1a-11a. The judgment of conviction in the Circuit Court, Albemarle County, Virginia, filed July 15, 1971,

Jurisdiction

The judgment of the Supreme Court of Virginia was entered on November 26, 1973, and a notice of appeal was filed in that court on December 20, 1973. The Jurisdictional Statement was filed on February 25, 1974 and jurisdiction was noted on July 8, 1974. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. Section 1257(2). The following decision sustains the jurisdiction of this Court to review the judgment by appeal in this case: Griswold v. Connecticut, 381 U.S. 479 (1965).

Statute Involved

Virginia Code, Section 18.1-63:

> If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a mis-demeanor.

Question Presented

1. Whether Virginia Code Section 18.1-63, prohibiting persons by "publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner," from encouraging or prompting the procuring of an abortion, violates the First Amendment on its face or as applied in this case, and is vague and overbroad and thereby violates the First Amendment and the Due Process Clause of the Fourteenth Amendment?

Statement of the Case*

The appellant, Jeffrey C. Bigelow, was a director, managing editor, and responsible officer of the Virginia Weekly, an underground newspaper (J.S. 4a) published by the Virginia Weekly Associates of Charlottesville, Virginia, and distributed in the Charlottesville area.

On February 8, 1971, the Virginia Weekly, Volume V, No. 6, was published and circulated in Albemarle County, Virginia, and in particular on the grounds of the University of Virginia. The publication and circulation were the direct responsibility of the appellant.

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*The facts were stipulated by counsel in the trial court and constituted the record on appeal in the state courts. The stipulation is contained in the separate Appendix [hereinafter App.] at p. 3. A copy of the issue of the newspaper which carried the advertisement is part of the record.

The February 8 issue carried the following advertisement on page 2:

--

UNWANTED PREGNANCY

LET US HELP YOU

Abortions are now legal in New York.
There are no residency requirements.

FOR IMMEDIATE PLACEMENT IN
ACCREDITED HOSPITALS AND
CLINICS AT LOW COST
Contact
WOMEN'S PAVILION
515 Madison Avenue
New York, New York 10022

or call any time

(212) 371-6670 or (212) 371-6650

Available 7 Days a Week

Strictly Confidential. We will make
all arrangements for you and help you
with information and counseling.

--

On May 13, 1971, the appellant was charged with violating Section 18.1-63 of the Code of Virginia which provided as follows:

> If any person by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage he shall be guilty of a misdemeanor.1/

In July, 1971, a non-jury trial on stipulated facts was held in the Circuit Court for Albemarle County. The only evidence consisted of the stipulation, the advertisement, and the June 1971 issue of Redbook Magazine, distributed in Virginia and in Albemarle County and containing abortion information (App., p. 3). After overruling appellant's objections to the constitutionality of the statute, the Circuit Court found the appellant guilty of violating the statute. He was sentenced to pay a fine of $500.00, with $350.00 of the fine suspended, conditional upon appellant's not violating the statute in the future (J.S. 15a).

Appellant timely noticed an appeal to the Supreme Court of Virginia, assigning as error the trial court's ruling that the statute applied to the advertisement, and the overruling of appellant's First Amendment objections to that statute (J.S. 16a-17a).

1/In 1972, that Section was amended to read as follows:

> If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or through the use of a referral agency for profit, or in any other manner, encourage or promote the processing of an abortion or miscarriage to be performed in this State which is prohibited under this article, he shall be guilty of a misdemeanor.

Thereafter, the Supreme Court of Virginia granted review, and in a 4 to 2 decision upheld the constitutionality of Section 18.1-63 and its applicability to the advertisement in question. The Court first held that the advertisement did encourage or prompt the procuring of abortion within the meaning of the statute, and was not merely informational (J.S. 3a). Second, the Court ruled that the prohibition of the statute could constitutionally be applied to the newspaper advertisement because of the broad governmental power "to regulate commercial advertising," particularly in the medical health field (J.S. 3a-7a).2/ Finally, the Court ruled that the appellant lacked standing to challenge the facial overbreadth of the statute because his First Amendment activity "was of a purely commercial nature":

> Thus, where, as here, a line can be drawn between commercial and non-commercial conduct and it clearly appears that the prohibited activity is in the commercial area, the actor does not have standing to rely upon the hypothetical rights of those in the non-commercial zone in mounting an attack upon the constitutionality of a legislative enactment. So we deny

2/ The stipulated facts contain no evidence to support the assumption below that both the advertisement and the advertiser were "commercial." The court so assumed because of the text of the advertisement.

> Bigelow standing to assert the rights of doctors, husbands, and lecturers. (J.S.10a).

The two dissenters found it unnecessary to determine whether the advertisement was "commercial" in the constitutional sense, because they concluded that the appellant clearly had standing "to challenge as overbroad the criminal statute under which he was convicted" and that the statute "seeks to limit freedom of speech in a vague and impermissibly broad manner." (J.S. 11a).

Thereafter, the appellant filed a timely Jurisdictional Statement with this Court (No. 72-932). On June 25, 1973, the Court entered the following order:

> Judgment vacated and case remanded to the Supreme Court of Virginia for further consideration in light of Roe v. Wade, 410 U.S. 113 (1973); and Doe v. Bolton, 410 U.S. 179 (1973). Bigelow v. Virginia, 413 U.S. 909 (1973).

On November 26, 1973, without calling for further argument, the Supreme Court of Virginia entered a per curiam opinion once again affirming the appellant's conviction. That Court reasoned that the abortion decisions were irrelevant to the issues here, since neither decision "mentioned the subject of abortion advertising" (J.S. 22a). In the words of the court below:

Bigelow's is a First Amendment case. He was convicted not of abortion but for running in his newspaper a commercial advertisement for a commercial abortion agency. We held that government regulation of commercial advertising in the medical-health field was not prohibited by the First Amendment. We find nothing in the new decisions of Roe v. Wade and Doe v. Bolton which in any way affects our earlier view. So we again affirm Bigelow's conviction (J.S. 22a).

Summary of Argument

I.

Newspapers are entitled to special protection under the First Amendment. Miami Herald Publishing Co. v. Tornillo, 42 U.S.L. W. 5098. No case since Milwaukee Publishing Co. v. Burleson, 255 U.S. 407 (1921), with the arguable exception of Pittsburgh Press v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973), has upheld the power of the federal or state governments to forbid the exercise of free editorial choice or to punish the press for exercising that choice. The conviction of appellant for publishing the advertisement in issue here, violates that principle.

A. The conviction must be reversed because publication of the advertisement is protected by the clear and present danger test and by the "imminent lawless action" test of Brandenburg v. Ohio, 395 U.S. 444

(1969). The advertisement informed Virginia residents that lawful abortions were available in New York state. It was not an integral part of action for there was ample "opportunity for full discussion." Whitney v. California, 274 U.S. 357, 377(1927). For the same reasons, the statute is unconstitutional on its face.

B. The state's authority to regulate in the medical health field cannot save the statute or sustain the conviction. That asserted justification falls in face of the First Amendment argument alone, which was put forward above. However, there are three additional constitutional interests which must be added to the scales in appellant's favor: the right of privacy, the right to travel, and the limitations upon the power of the states to penalize its citizens for actions unlawful in the state of residency but lawful where performed out-of-state. Griswold v. Connecticut, 381 U.S. 479 (1965); Slaughter-House Cases, 16 Wall. 36 (1873); Shapiro v. Thompson, 394 U.S. 618 (1969); Huntington v. Attrill, 146 U.S. 657, 36 L. Ed. 1123, 1128 (1892).

II.

The advertisement was not "purely commercial" speech and is therefore outside the rule of Valentine v. Chrestensen, 316 U.S. 52 (1942). The content of the advertisement and the controversy surrounding its subject matter, Roe v. Wade, 410 U.S. 113, 116 (1973), prohibits a "purely commer-

cial" characterization. Furthermore, "speech is not rendered commercial by the mere fact that it relates to an advertisement." Pittsburgh Press v. Pittsburgh Commission on Human Relations, supra at 384. See N.A.A.C.P. v. Button, 371 U.S. 415 (1963); New York Times v. Sullivan, 376 U.S. 254 (1964).

III.

Section 18.1-63 is overbroad for it "sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Grayned v. City of Rockford, 408 U.S. 104, 114 (1972). See also Broadrick v. Oklahoma, 413 U.S. 601 (1973). The statute is overbroad because, for example, it prohibits a speech urging that women have the right to obtain an abortion, prohibits a Virginia doctor from suggesting that a patient obtain a legal abortion in Virginia or elsewhere, and prohibits appellant from publishing an editorial in support of the right of abortion.

ARGUMENT

I.

SECTION 18.1-63, ON ITS FACE OR AS APPLIED IN THIS CASE, VIOLATES THE FREE PRESS GUARANTEE OF THE FIRST AMENDMENT.

From the time of the Holmes-Brandeis dissent in Milwaukee Publishing Co. v. Burleson, 255 U.S. 407 (1921), through Miami Herald Publishing Co. v. Tornillo, 42 U.S.L.W. 5098 (June 25, 1974), this Court has surrounded newspapers with special protection under the First Amendment, in recognition of the elementary fact that the nation's political institutions are free only insofar as its press is free of governmental regulation or censorship. The Court has consistently resisted attempts by the federal and state governments to invade or diminish the right of newspapers freely to choose the material they will put into print. Whether the attempts have taken the form of prior restraints,3/ subsequent punishments,4/ discriminatory taxes,5/

3/ Near v. Minnesota, 283 U.S. 697 (1931); New York Times v. United States, 403 U.S. 713 (1971).

4/ Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946); Craig v. Harney, 331 U.S. 367 (1947); Mills v. Alabama, 384 U.S. 214 (1966).

5/ Grosjean v. American Press Co., 297 U.S. 233 (1936).

or inhibiting forms of libel actions,6/ the Court has uniformly recognized that the purpose of the First Amendment is to insure and encourage a free press as a fundamental instrument of political liberty. Even so conservative a jurist as Mr. Justice Sutherland appreciated the indispensability of a free press in a free society. Speaking for the Court in Grosjean v. American Press Co., supra at 250, he described the function of a free press in the following terms:

> . . . since informed public opinion is the most important of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

The same appreciation permeates the Court's opinion thirty years later in Mills v. Alabama, 384 U.S. 214 (1966). Mr. Justice Black's opinion for the Court said (at 219):

> Suppression of the right of the press to praise or criticise governmental agents and to clamor and contend for or against

6/ New York Times v. Sullivan, 376 U.S. 254 (1964); Butts v. Curtis Publishing Co., 388 U.S. 130 (1967); Rosenbloom v. Metromedia, cf. Gertz v. Welch, Inc., 42 U.S.L.W. 5123 (June 25, 1974).

> change . . . muzzles . . . the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.

No case since Burleson (apart, arguably, from Pittsburgh Press v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973), see note 7 , infra) is to be found which upholds the power of the federal or state governments to forbid the exercise of free editorial choice or which punishes the press for exercising that choice.

That historical fact is a special feature of our political system and its theme was reemphasized only a few months ago by a unanimous Court in Tornillo:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials--whether fair or unfair--constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. 42 U.S.L.W. at 5103.

Even in Pittsburgh Press, a 5 to 4 decision, the majority closely confined its opinion by resting upon the purely commercial

character of the employment want ads involved in the case, the fact that they did not express a position on "a matter of social policy," and the absence of editorial "judgmental discretion" in the content and placement of the ads. And the opinion closed by stating that

> . . . [W]e reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues however controversial. 413 U.S. at 391.7/

Appellant, then, would argue that, as a necessary principle under the First Amendment, he cannot be punished criminally for exercising his editorial choice to publish the advertisement in issue. As Mr. Justice Douglas said in Pittsburgh Press:

> . . . [t]he First Amendment presupposes free-wheeling, independent people whose vagaries include ideas spread across the entire spectrum of thoughts and beliefs. I would let any expression in that broad spectrum flourish, unrestrained by Government, unless it was an integral part of action--. . . 413 U.S. at 399 (dissenting opinion).

7/ The dissenters, of course, thought that even these advertisements were protected by the First Amendment. For a criticism of Pittsburgh Press on First Amendment grounds, see Hepburn, Pittsburgh Press and the First Amendment, 2 Women's Rights Law Reporter 6 (1974).

A. The advertisement is not an integral part of action.

Whether one applies the classic clear and present danger doctrine to the facts of this case, or the "imminent lawless action" test articulated in Brandenburg v. Ohio, 395 U.S. 444 (1969), the result is the same, for the Virginia statute must fall under both tests and publication of the advertisement must be held protected from criminal prosecution and conviction.

It is perfectly clear that the contents of the advertisement at issue were informational, far removed from action, no less imminent action. Though also removed from "mere abstract teaching" [Noto v. United States, 367 U.S. 290, 297 (1961)], since the ad was more than a discussion supporting the idea of abortion, or calling for efforts to persuade a legislature to legalize abortion, it is nonetheless well within the zone of protected speech. The advertisement notified Virginia citizens that abortion was legal in New York State and provided an address and phone number through which abortions could be arranged and through which "information and counseling" was available. As such, it admittedly ran afoul of the statute's own terms, for it must be fairly said that the advertisement may well have "encourage[d] and prompt[ed] some Virginia citizens to procure, or consider procuring, an abortion for themselves, their wives or their friends. But any statute which bans speech which may have a tendency to "encourage or prompt"

outlawed conduct cannot stand in face of the First Amendment, otherwise the spectrum of permissible speech would be radically limited. Speech would be stifled, not encouraged. See New York Times v. Sullivan, supra.

The speech in this case, however, no matter how it may have encouraged or prompted abortion, or consideration of abortion, is well within the parameter of speech protected under the clear and present danger test or the Brandenburg test, because there was, in Mr. Justice Brandeis' words, "opportunity for full discussion" [Whitney v. California, 274 U.S. 357, 377 (1927)], before any interested women obtained an abortion. She could discuss the question with her family, friends, and physician, and fully consider whether to undergo an abortion, once having been informed by the ad that one was available to her in New York State.8/ Clearly, then, publication of the ad was not an integral part of action, and surely not coercive. Cf. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949). Rather, it was a means by which Virginia citizens could be informed of the availability of abortion information

8/ This pragmatic measure of the degree to which an outdoor advertisement presented the necessary clear and present danger of the commission of an abortion, was applied in Mitchell Family Planning, Inc. v. City of Royal Oak, 335 F. Supp. 738, 742-743 (E.D. Mich. 1972), as an alternative basis for striking down an ordinance prohibiting advertising of abortions on billboards.

and services and clearly within the area of protected speech as defined in Thornhill v. Alabama, 310 U.S. 88, 102 (1940):

> Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

The Virginia statute therefore must fall because it undertakes to "contract the spectrum of available knowledge" [Griswold v. Connecticut, 381 U.S. 479, 482 (1965)], and to suppress the flow of information which enables individuals to deal with "matters so fundamentally affecting a person as the decision whether to bear or beget a child" [Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)], a decision which this Court has now held to be protected by the constitutional right of privacy. Roe v. Wade, 410 U.S. 113 (1973).

B. The State's authority to regulate in the medical health field cannot save the statute or sustain the conviction.

It was the view of the Virginia Supreme Court that Section 18.1-63 was "a reasonable measure to ensure that pregnant women in Virginia who decide to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder" (J.S. 7a). Since that justification was put forward in

support of a statute that affects the First Amendment and the right of privacy, ". . . the State may prevail only upon showing a subordinating interest which is compelling," Bates v. Little Rock, 361 U.S. 516, 524 (1960); and that interest "cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 (1960). In light of those constitutional requirements, the State's justification is totally inadequate.

We have argued above that the constitutional interest in freedom of the press, and the correlative right of readers to receive useful information relating to a controversial social issue, requires that appellant's conviction be reversed. Those interests are by themselves so compelling that they are not overcome in this case by Virginia's asserted interest in regulating the medical health field. There are, however, three additional constitutional interests which must be added to the scale in appellant's favor--the right of privacy, the right to travel, and the limitations upon the power of the states to penalize its citizens for actions unlawful in the state of residency but lawful when performed outside that state.

In February 1971, when appellant was tried and convicted for publishing the informational advertisement, abortion was prohibited in Virginia except for the

narrowest exceptions.9/ This prohibition was common, in varying degree, to the vast majority of states in the country. Abortion was, however, legal in New York, as the result of legislation. That legislative choice by New York was both appropriate in terms of its power to protect the health and well-being of its people, and invulnerable to constitutional challenge since the power to permit abortion logically follows from and is encompassed within the power of a state, prior to Roe v. Wade and Doe v. Bolton, to regulate abortion to any degree.

In Roe v. Wade and Doe v. Bolton, the Court held that the fundamental right to privacy includes the decision to have an

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9/ Code of Virginia §18.1-62 (1971 Cumm. Supp.), provided:

> --If any person administer to or cause to be taken by a woman, any drug or other thing, or use means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and thereby destroy such child, or produce such abortion or miscarriage, he shall be confined in the penitentiary not less than one nor more than ten years.

Sec. 18.1-62.1, allowed abortion, after 120 days residency, if pregnancy was "likely to result in the death of the woman, or substantially impair [her] mental or physical health"; if the child was likely to be born "with an irremediable and incapacitating mental or physical defect; or if pregnancy was the result of incest or forcible rape."

abortion. That Virginia did not recognize this right in 1971 means neither that it did not at that time inhere in Virginia women, nor that such women could be penalized for seeking to travel out of state to exercise the right in states where abortion was legal.10/

The judicial groundwork for the constitutional right to freedom and privacy in matters intimately affecting marriage, procreation and family relationships was well established by 1971, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); and Skinner v. Oklahoma, 316 U.S. 535 (1942). Even in the absence of such precedents, Virginia women

10/ The Court could dispose of this case very directly and simply by declaring Roe and Doe to have retroactive effect and thus nullifying any conviction based upon a statute which assumed the power of the states to regulate abortion in totality. The Second Circuit did precisely that in U.S. ex rel. Williams v. Preiser, 497 F.2d 337 (1974), where it vacated a 1966 conviction of a physician under New York's anti-abortion statute. Given Roe and Doe, the court said (at 339), "Section 1050 is, 'in legal contemplation, as inoperative as though it had never been passed.' Norton v. Shelby County, 118 U.S. 425, 442 (1886). This declaration of retroactive invalidity assures the supremacy of the newly recognized substantive right over a state's power to punish." See also Davis v. United States, 42 U.S.L.W. 4857 (June 11, 1974).

had the right to travel freely between states for a myriad of purposes, not the least of which was to seek medical treatment legally being dispensed in New York.

The fact that most abortions were illegal in Virginia 11/ at the time of appellant's conviction, thereby raising a superficial similarity to the fact situation in Pittsburgh Press, is of no avail to the State here because the advertisement solicited interest in abortions performed in New York State where they were legal. The case is therefore distinctly different than Pittsburgh Press.

We advert to this state of facts in response to the assertion by the majority in Pittsburgh Press that any First Amendment interest of the newspaper there "is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." 413 U.S. at 389 . But that "valid limitation," in turn, is itself altogether absent when the activity advertised is legal where it is to be consummated.12/

11/That some abortions were then legal in Virginia is an aspect of the statute's overbreadth with which we deal in Point III, infra.

12/The ordinance involved in Pittsburgh Press, in recognition of the constitutional inhibition against prohibiting the advertisement of activity not illegal, specifically excluded from coverage jobs exempt from its anti-dis-

In that case, Virginia has no valid interest in prohibiting its citizens from being informed of the availability of the legal activity.

The salient fact is that the advertisement proposes an activity which is to be consummated entirely outside Virginia's boundaries. Apart from the First Amendment considerations canvassed above, we can concede for argument's sake that the case might be different if an advertisement proposed a transaction, lawful elsewhere but illegal in Virginia, where its nature allowed the possibility of consummation in Virginia, for example, the sale of marijuana or fireworks (assuming their illegality in Virginia). In those cases, though the sale outside of Virginia might be lawful, the nature of the advertised commodity would allow it to be imported into and used within Virginia in violation of local law. But an abortion is of an entirely different nature. It is completed upon being performed outside Virginia and there are no contacts between the surgical operation and the State of Virginia except the fortuitous fact that the woman resides

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crimination provisions. 413 U.S. at 380.

The Virginia legislature belatedly acknowledged the same constitutional inhibition by amending Sec. 18.1-63 in 1972 so that it applies only to speech relating to "abortion or miscarriage to be performed in this State . . ." See note 1, supra, for the full text of the amended statute.

there. Virginia can assert an interest in banning the advertisement in issue here only if it also intends to assert the power to punish Virginia residents who undergo abortions outside its jurisdiction, or who engage in any other activity which is illegal in Virginia though lawful where performed. But it has no such power, for the States can impose criminal sanctions only for conduct within its jurisdiction. Huntington v. Attrill, 146 U.S. 657, 36 L.Ed. 1123, 1128 (1892). To say that the state has that power is to invest state government with a degree of paternalistic power over its citizens and over their right to travel about the United States and freely conform to the laws of the various states through which they travel, which would violate the privileges and immunities clause, see The Slaughter-house Cases, 16 Wall. 36 (1873), and the more modern constitutional right to travel which is protected by the due process clause of the Fourteenth Amendment, Shapiro v. Thompson, 394 U.S. 618 (1969).

Last term the Court struck down a residency requirement for county-paid health cases as violative of the right to travel. Memorial Hospital et al. v. Maricopa County, et al., 42 U.S.L.W. 4277 (February 26, 1974). The issue there was a residency requirement. A similar residency requirement for medical care--specifically for abortions--was struck down by this Court in Doe v. Bolton, in terms that affect any state statute which would confine the citizens of

one state to that state for medical treatment or hinder their travel to other states for such treatment:

> Just as the Privileges and Immunities Clause Constitution Article IV §2 protects persons who enter other states to ply their trades, [citations omitted], so must it protect persons who enter Georgia seeking the medical services that are available there. See Toomer v. Witsell, 334 U.S. 385, 396-397 (1948). A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve.

Certainly, if the receiving state cannot prohibit migration travel to its cities for medical care, surely the state from which some migrants come may not restrict them either.

These considerations of the limits upon state power, combined with dominant First Amendment aspects of this case, and the special constitutional protections extended to decisions whether or not to bear children, all combine to overwhelm the slim interest, if indeed it is a valid interest at all, asserted by the Virginia Supreme Court. That interest cannot survive the competing constitutional considerations which we have described.13/

13/ In Hiett v. United States, 415 F.2d 664 (1969), the Fifth Circuit struck down a federal statute (18 U.S.C. §1714)prohibiting use of the mails for advertisements giving information on the availability of foreign divorces on the ground, inter alia, that "information on matters of social importance, especially those relating to the marriage relation and the exercise of rights arising from the relation, is also given extensive Constitutional protection. Griswold v. Connecticut"(at 672).

II.

THE ADVERTISEMENT IN THIS CASE WAS NOT "PURELY COMMERCIAL" SPEECH.

It will be argued, of course, as the Supreme Court of Virginia held, relying principally upon Valentine v. Chrestensen, 316 U.S. 52 (1942), that none of the foregoing analysis bears on this case because the advertisement in issue was commercial speech and therefore stripped of all constitutional protection, including the First Amendment.

By invoking the magical phrase, "commercial advertising," the Supreme Court of Virginia has allowed the imposition of criminal punishment upon a newspaper editor for publishing information of political and social importance, merely because it was imparted in the form of an advertisement and described services available for a fee.

But the advertisement, by virtue of its content and the controversy surrounding its subject matter, cannot therefore be conclu-

sively characterized as "purely commercial" and thus stripped of First Amendment protection.14/

This Court has consistently rejected state attempts to exclude categories of speech from the safeguards of the First Amendment by attaching labels to the kinds of expression involved. See N.A.A.C.P. v. Button, 371 U.S. 415 (1963); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Pittsburgh Commission on Human Relations, supra. Rather, the Court has examined the content of the speech and protected the expression of opinion or the communication of information, regardless of whether labels such as "solicitation" (Button) or "libel" (Sullivan) are sought to be applied to the speech. In this case, if the identical information--describing the legality of abortion in New York and identifying agencies from which further information could be obtained--had been contained in the text of a news article or editorial, the First Amendment would surely have protected appellant against conviction under the statute at issue. See Pittsburgh Press, 413 U.S. at 391. Only a strained

14/ It is important to emphasise the precise holding in Valentine:

> . . . [T]he Constitution imposes no such restraint on government as respects purely commercial advertising. 316 U.S. at 54 (emphasis added).

application of the commercial speech doctrine yields a different result here.

First, it is clear that ". . . speech is not rendered commercial by the mere fact that it relates to an advertisement," Pittsburgh Press, 413 U.S. at 384, nor by the fact that the newspaper is paid for publishing the advertisement. Ibid.; New York Times v. Sullivan, supra, at 266. Similarly, First Amendment protection cannot be withheld because the communication involves the solicitation of funds or because of the profit-making nature of the advertiser; the existence of "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." Ginzburg v. United States 383 U.S. 463, 474 (1966); New York Times Co. v. Sullivan, supra; Smith v. California, 361 U.S. 147 (1959); Jamison v. Texas, 318 U.S. 413 (1943).

Instead, this Court has indicated that the content of the advertisement must be examined to decide whether, on the one hand, it contains "purely commercial advertising" which does "no more than propose a commercial transaction . . ." Pittsburgh Press, 413 U.S. at 385, Valentine v. Chrestensen, 316 U.S. 52, 54 (1942), or, on the other hand, it ". . . communicate[s] information, express[es] opinion, recite[s] grievances, protest[s] claimed abuses . . ." or seeks financial support for an important social movement. New York Times Co. v. Sullivan,

supra at 266. But the Court has not identified the criteria by which to determine where a particular advertisement will be placed on the spectrum. In Valentine, where the commercial speech exception originated, the advertisement was a flyer announcing the sale of admission to a submarine on exhibit. In Pittsburgh Press, the classified advertisements were characterized as "no more than a proposal of possible employment" and thus "classic examples of commercial speech." 413 U.S. at 385.

Here, by contrast, the advertisement contained much more than a proposal for a commercial transaction and consequently cannot be characterised as "purely commercial."

First, it explicitly provided the information that the law in New York had been changed, that abortions there were legal, and that no residency requirements were imposed. At the time the advertisement appeared, such information was vital to persons in Virginia attempting to deal with matters as fundamental ". . . as the decision whether to bear . . . a child." Eisenstadt v. Baird, supra at 453. Surely, such information ranks higher on the scale of First Amendment interests than does information about a submarine tour. See, Associated Students for the University of California at Riverside v. Attorney General, 368 F. Supp. 11 (D.C.Cal. 1973)(three-judge court) and Atlanta Cooperative News Project v. United States Postal Service, 350 F. Supp.

234 (N.D.Ga. 1972)(three-judge court)(holding unconstitutional the federal statutes, 18 U.S.C. §1461 and 39 U.S.C. §3001, prohibiting the mailing of abortion information).

Similarly, the information that New York had legalized abortions was important not just to persons dealing with pregnancy, but to citizens in Virginia generally. The knowledge that other states had altered their laws on such a controversial subject as abortion is likely to have a tangible impact on the attitudes of persons concerning restrictive laws in their own state. Such realization, in turn, may prompt an individual to take steps to change the law. And thus, the statement that "Abortions are now legal in New York" has a direct potential for fueling the process of self-government which is at the heart of First Amendment concern. See, e.g., Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367 (1969).

Finally, in the circumstances here, the very running of the advertisement is an implicit editorial endorsement of the legality of abortions and the availability of abortion information and services. The newspaper in which the advertisement appeared was not a regular, establishment paper, but an "underground" paper, run by a "collective" whose staff members were expressly and openly concerned with the entire abortion issue (J.S. 4a). In 1971 when this advertisement appeared in appellant's newspaper, abortion was an issue of great political, social, and

moral debate, and it remains so today. Abortion laws have been the subject of intense controversy in the public forum, the legislatures, political campaigns and in the courts. Indeed, its controversial nature was explicitly recognized in the preface to this Court's decision in Roe v. Wade, 410 U.S. at 116:

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

Given the content and the context of this advertisement, it must be read as an implicit expression of editorial opinion on the subject matter involved.15/

15/ By the same token, under these circumstances the decision to run this particular advertisement implicated the newspaper's editorial judgment and processes in a way that the decision on placement of employment advertisements in Pittsburgh Press did not.

To paraphrase the Court in Pittsburgh Press, the advertisement here resembles the one in New York Times Co. v. Sullivan more closely than the handbill in Valentine v. Chrestensen, and, therefore, cannot be categorized as "purely commercial advertising," beyond the pale of the First Amendment.16/

Inflexible application of the commercial speech doctrine is particularly dangerous where the medium regulated is a newspaper. With the exception of this Court's sharply

16/ Judge Wright, though describing as "persuasive" the arguments that product advertising "is generally unrelated to the values which the First Amendment was designed to preserve," Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 592 (D.D.C.1971), has said:

> But it does not follow from their general validity that the words "product advertising" are a magical incantation which, when piously uttered, will automatically decide cases without the benefit of further thought. Thus when commercial speech has involved matters of public controversy [citing New York Times v. Sullivan, supra, and Thornhill v. Alabama, supra] or artistic expression [citing Smith v. California, 361 U.S. 147 (1959)], or deeply held personal beliefs, [citing United States v. Ballard, 322 U.S. 78 (1944)], the courts have not hesitated to accord it full First Amendment protection.

divided decision in Pittsburgh Press, the Court has traditionally and consistently singled out newspapers for special First Amendment protection. See Point I.A., supra. Thus, the reliance below on decisions employing the "commercial" speech doctrine in the area of television and radio broadcasting is irrelevant. Decisions such as New York State Broadcasters Association v. United States, 414 F.2d 990 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970); Banzhaff v. F.C.C., 405 F.2d 1082 (D.C.Cir. 1968); cert. denied, sub nom. Tobacco Institute Inc. v. F.C.C., 396 U.S. 842 (1969); and Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971)(three-judge court), aff'd sub nom., Capital Broadcasting Co., et al. v. Acting Attorney General, et al., 405 U.S. 1000 (1972), were premised either on the federal government's broader power to regulate the electronic media or on a specific, historic congressional policy over the substantive problem, for example, the use of government regulated instrumentalities to conduct lotteries. These decisions merely reflect the distinctions between free print media and regulated electronic media; they cannot be invoked as the basis for suppressing the former.

To allow the commercial advertising doctrine to serve as the basis for sustaining the appellant's conviction is to sanction a "disturbing enlargement" of that doctrine "and a serious encroachment on the freedom of the press guaranteed by the First Amendment." Pittsburgh Press, 413 U.S. at 393

(Burger, Ch. J., dissenting). If the doctrine allows criminal punishment of a newspaper editor for publishing an advertisement supplying information about a lawful medical service which was the subject of great social controversy, then the question of the continued vitality of the commercial advertising exception from First Amendment protection would surely have to be confronted.17/

17/ A variety of courts and commentators have urged that the rigid commercial speech doctrine be relaxed to allow some First Amendment protection for advertising. For example, in United States v. Pellegrino, 467 F.2d 41, 45 (1972), the Ninth Circuit observed:

> We cannot agree with the Government that advertising is devoid of literary, artistic or other social value and accordingly is less deserving of First Amendment protection than the substance of that which is advertised. Advertising performs an important First Amendment function in aid of communication.

On this Court, Mr. Justice Douglas, though he joined the unanimous opinion in Valentine v. Chrestensen, announced eighteen years ago that that ruling "has not survived reflection." Cammarano v. United States, 358 U.S. 498, 513 (1958). The First Amendment, he said (at 514):

> . . . is not in terms or by implication confined to discourse of a particular kind and nature . . . The profit motive should make no difference, for that is an element inherent in the very conception of a free press under our system of free enterprise . . . Chief Justice Hughes speaking for the Court in Lovell v. Griffin, 303 U.S. 444, 452 defined the First Amendment right with which we now deal in the broadest terms, 'The Press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.

Mr. Justice Douglas reaffirmed that view in Dun and Bradstreet, Inc. v. Grove, 404 U.S. 898, 904-905 (1971)(dissent), and Pittsburgh Press, 413 U.S. at 397-398. See also the opinions of Mr. Justice Stewart in Pittsburgh Press, 413 U.S. at 401, and of Mr.Justice Brennan in Lehman v. Shaker Heights 42 U.S.L.W. 5116, 5121, n. 6 (June 25, 1974) (dissenting opinion); and see Note, Freedom of Expression in a Commercial Context, 78 Harv.L.Rev. 1191 (1965); Redish, The First Amendment in the Market Place: Commercial Speech and Values of Free Expression, 39 Geo.Wash.L.Rev. 429 (1971).

III.

SECTION 18.1-63 IS OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT.

The overbreadth of this statute, simultaneously prohibiting expression which arguably can be proscribed and that which may not, is apparent. By its terms, it prohibits a speech urging that women have a right to obtain an abortion; it prevents a husband from discussing the possibility of an abortion with his pregnant wife; it prevents a Virginia doctor from suggesting that a patient obtain a legal abortion in Virginia or elsewhere; it suppresses abortion information supplied by a non-profit, noncommercial agency; in fact, it prohibits appellant from writing and publishing an editorial which could be said to encourage abortion. It simply "sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Grayned v. City of Rockford, 408 U.S. 104, 114 (1972). See, Hiett v. United States, supra; Mitchell Family Planning, Inc. v. City of Royal Oak, supra at 741-742. Thus it suffers from the fatal constitutional defect of overbreadth.

This Court has required that provisions impinging upon areas protected by the First Amendment must be drawn with sufficient narrowness and precision to insure that First Amendment freedoms retain the "breathing space" necessary for robust survival. E.g. Note, The First Amendment Overbreadth

Doctrine, 83 Harv. L. Rev. 844 (1970); Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. Law Rev. 67 (1960); Broadrick v. Oklahoma, 413 U.S. 601 (1973). As was true of the statute in Spence v. Washington, 42 U.S.L.W. 5148, 5151, n. 9 (June 25, 1974), Sec. 18.1-63 is of "limitless sweep" and must therefore fall. See also Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971); Keyshian v. Board of Regents, 385 U.S. 589 (1967); Cox v. Louisiana, 379 U.S. 536 (1965); Plummer v. Columbus, 42 U.S.L.W. 2222 (Oct. 16, 1973).

In Broadrick, Mr. Justice White articulated the rationale underlying the First Amendment overbreadth doctrine when he stated:

> "It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendmend rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.

Thus, Section 18.1-63 cannot survive constitutional scrutiny if its proscriptions are so broadly drawn as to justify a "judicial prediction or assumption" that it will induce third persons to refrain from protected activity as a consequence. The statute plainly has that exact effect and is therefore unconstitutional.

As Mr. Justice White noted in Broadrick, a second policy underlying the First Amendment doctrine is a concern that no penal statute, especially in the First Amendment area, may vest a local functionary with "standardless" discretion to determine whether or not a given form of expression falls within its proscription. It is, of course, a truism to observe that any such overbroad statute is a licensing provision, permitting only that expression tolerated by local officials to flourish.

In Cox v. Louisiana, 379 U.S. 536 (1965), this Court, in declaring a broadly worded breach of the peace statute unconstitutional, stated:

> [t]he lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor. 379 U.S. at 557.

In Thornhill v. Alabama, 310 U.S. 88 (1940) a broad anti-picketing ordinance was invalidated because:

> The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. 310 U.S. at 97-98.

That second defect is apparent on the face of Sec. 18.1-63 and from the record in this case. As we have already mentioned above, the statute's very terms allow standardless application. Furthermore, the record shows that appellant, whose publication is an unorthodox underground newspaper, was prosecuted, but that Redbook Magazine, an

established orthodox publication, was not, even though it carried "abortion information from across the United States" (App.p.3). Though it will no doubt be said that the difference is that Redbook's information was editorial whereas appellant's was an advertisement, it can, of course, as well be said that the difference is that Virginia chose to prosecute appellant because they disliked his publication, and chose not to prosecute Redbook--though the terms of the statute allow it--because of its size, prominence and reputation. For that additional reason, Sec. 18.1-63 must be declared unconstitutional.

A. Appellant has standing to argue the overbreadth of the statute.

The court below, explicitly refusing to give the statute a limiting construction, compare New York State Broadcasting Association v. United States, supra, 414 F.2d at 997, held that because appellant's activity was "commercial," he lacked standing to challenge the statute's overbreadth.18/ In reaching this conclusion, the Supreme Court of Virginia relied exclusively and improperly on Breard v. Alexandria, 341 U.S. 622 (1951). Breard involved an ordinance

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18/ The court did state in dictum that it would not interpret the statute to encompass some of the suggested hypothetical applications, but the holding rested on the conclusion that the appellant lacked standing to raise these arguments (J.S. 9a-10a). In any case, the ostensible narrowing of the statute is insufficient. See Gooding v. Wilson, supra.

prohibiting uninvited soliciting by door-to-door salesmen of magazine subscriptions. In response to a First Amendment challenge, this Court observed: "Only the press or oral advocates of ideas could urge this point. It was not open to the solicitors for gadgets or brushes." Id. at 641. Even under this reasoning, the appellant, as a member of the press, was entitled to mount an overbreadth challenge to this statute.

More importantly, the decision below simply ignored this Court's contemporary overbreadth doctrine that one whose own conduct is not protected may nevertheless raise a challenge to an overly broad statute: "Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge." Grayned v. City of Rockford, 408 U.S. 104, 114 (1972). As the Court explained last Term, in the First Amendment area the normal standing rules are relaxed in order to enforce the requirement that statutes which regulate expression are narrowly and precisely drawn:

> Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression. Broadrick v. Oklahoma, 413 U.S. at 612.

And allowing an overbreadth challenge is particularly appropriate where, as here, the statute directly regulates expression.

Finally, the employment of an overbreadth analysis is not undermined by the recent change in the statute. The amendment in no way narrowed the reach of the statute, but simply added a prohibition on "the use of a referral agency for profit" to "encourage or promote the processing of an abortion . . . " See note 1, supra. Virginia still provides that, "If any person, by publication, lecture, advertisement, or by sale or circulation of any publication, . . . or in any other manner, encourage or promote the processing of an abortion or miscarriage to be performed in this State which is prohibited under this article, he shall be guilty of a misdemeanor." And thus since Virginia still claims the authority to punish protected expression, "manifestly, strong medicine" must be administered. Broadrick v. Oklahoma, supra, at 613.

CONCLUSION

For the reasons stated above, appellant's conviction must be reversed and Section 18.1-63 declared unconstitutional.

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September 1974

Supreme Court, U. S.
FILED
OCT 21 1974
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1974

No. 73-1309

JEFFREY COLE BIGELOW,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

On Appeal from the Supreme Court of Virginia

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In The

Supreme Court of the United States

October Term, 1974

No. 73-1309

JEFFREY COLE BIGELOW,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

On Appeal from the Supreme Court of Virginia

BRIEF FOR APPELLEE

OPINIONS BELOW

The opinion of the Supreme Court of Virginia entered upon remand from this Court is reported at 214 Va. 341, 200 S.E.2d 680 and is set forth at J.S. 21a-22a.* The order of this Court vacating the earlier decision of the court below and remanding the case for further consideration is reported at 413 U.S. 909 and is set forth at J.S. 20a. The earlier opinion of the Supreme Court of Virginia is reported at 213 Va. 191, 191 S.E.2d 173 and is set forth at J.S. 1a-11a.

* Citations in this brief in the form "J. S. ....." refer to the Appendix to the Appellant's Jurisdictional Statement. Citations in the form "A. ....." refer to the Appendix filed herein.

The judgment of conviction in the Circuit Court, Albemarle County, Virginia, is not reported and is set forth at J.S. 14a-15a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). The statement was timely filed. Probable jurisdiction was noted on July 8, 1974.

CONSTITUTIONAL AND STATUTORY PROVISIONS

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." U.S. Const. Amend. I.
>
> * * *
>
> "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." Va. Code Ann. § 18.1-63.

QUESTIONS PRESENTED

1. Whether a state, exercising its police powers to protect the health, safety and welfare of its citizens, may prohibit purely commercial advertisements of commercial abortion referral agencies?

2. Whether a person, whose conduct was of a purely commercial nature and therefore within the hard core of activity prohibited by a statute and not protected by the First Amendment, has standing to raise the hypothetical rights of others who cannot possibly be affected because the statute, even prior to its amendment, was authoritatively construed to prohibit only commercial activity?

STATEMENT

The Appellant was a director, managing editor and resonsible officer of the Virginia Weekly, a newspaper distributed in the Charlottesville area.[1] The February 8, 1971, issue of the Virginia Weekly, which was published and circulated in Albemarle County, Virginia, carried the following advertisement on page 2:

UNWANTED PREGNANCY
LET US HELP YOU

Abortions are now legal in New York.
There are no residency requirements.

FOR IMMEDIATE PLACEMENT IN ACCREDITED HOSPITALS AND CLINICS AT LOW COST

Contact

WOMEN'S PAVILION
515 Madison Avenue
New York, N. Y. 10022

or call any time

(212) 371-6670 or (212) 371-6650
AVAILABLE 7 DAYS A WEEK

STRICTLY CONFIDENTIAL. We will make all arrangements for you and help you with information and counseling.

[1] There is no evidence in the record to support Appellant's contention that the Virginia Weekly is an underground newspaper.

The publication and circulation of the February 8th issue of the Virginia Weekly were the direct responsibility of the Appellant.

The Appellant was arrested on the charge of unlawfully encouraging or prompting the procuring of abortion in violation of § 18.1-63 of the Code of Virginia, which provided as follows:

> "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor."[2]

The Appellant was tried in the County Court of Albemarle County on May 27, 1971, found guilty and given a fine of $500.00, of which $350.00 was suspended. Thereafter, the Appellant appealed to the Circuit Court of Albemarle County where, on June 15, 1971, he was given a *de novo* trial before the court, having waived his right to trial by jury. For purposes of appeal to the circuit court, the parties entered into a stipulation of facts. (A. 3, 8.)

The Circuit Court found the Appellant guilty and fined him $500.00, of which $350.00 was suspended on condition that the Appellant not violate § 18.1-63 again. (J.S. 15a.)

An appeal to the Supreme Court of Virginia was later perfected and a writ of error was granted to review the proceeding. (J.S. 16a-17a.) The Appellant raised two issues before the Supreme Court of Virginia: (1) whether the

[2] Effective July 1, 1972, § 18.1-63 was amended and now provides:

> "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or through the use of a referral agency for profit, or in any other manner; encourage or promote the processing of an abortion or miscarriage to be performed in this State which is prohibited under this article, he shall be guilty of a misdemeanor."

advertisement in question violated § 18.1-63 of the Code of Virginia and (2) whether § 18.1-63 was violative of the First Amendment. (213 Va. at 193, 197, 191 S.E.2d at 174, 177; J.S. 2a and 17a.) the court rejected both contentions. First, it held that the advertisement "clearly exceeded an informational status" and "constituted an active offer to perform a service," and thus violated both the letter and intent of § 18.1-63. (213 Va. at 193, 191 S.E.2d at 174; J.S. 3a.)

Next, the court below found the advertisement to be purely commercial (213 Va. at 193-94, 198, 191 S.E.2d at 174-75, 177; J.S. 3a-4a, 10a.) and thus subject to regulation by the state. (213 Va. at 194-97, 191 S.E.2d at 175-77; J.S. 4a-9a). It then held the statute to be a valid exercise of the state's police power (213 Va. at 196-97, 191 S.E.2d at 176-77; J.S. 7a, 9a.):

> "Focusing attention upon Code § 18.1-63, the statute here in question, we emphasize that it deals with abortion, a matter vitally affecting public health and welfare and in the important realm of medicine. It is clearly within the police power of the state to enact reasonable measures to ensure that pregnant women in Virginia who decide to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder. And the state is rightfully interested in seeing that Virginia women who do decide to have abortions obtain proper medical care and do not fall into the hands of those interested only in financial gain, and not in the welfare of the patient.
>
> * * *
>
> "It is against the evils of such practices as are disclosed by the New York cases that the advertisement restriction in Code § 18.1-63 is designed to protect. This state has a real and direct interest in ensuring that

the medical-health field be free of commercial practices and pressures, and we hold that Code § 18.1-63 is a reasonable measure directed to that purpose. *Semler* v. *Dental Examiners, supra,* 294 U.S. at 612-13."

In refusing to strike down the statute as being violative of the First Amendment due to overbreadth, the Supreme Court of Virginia authoritatively construed § 18.1-63 and excluded from its scope a doctor who advises a patient to have an abortion, or a husband who encouraged his wife to secure an abortion, or a lecturer who advocates a right to abortion. (213 Va. at 197, 191 S.E.2d at 177; J.S. 9a-10a.) Finally, because the Appellant's activity was of a purely commercial nature, the court below denied him standing to raise the hypothetical rights of those in the non-commercial zone. (213 Va. at 198, 191 S.E.2d at 177-78; J.S. 10a.)

Thereafter, the Appellant filed a Jurisdictional Statement and the Appellee filed a Motion to Dismiss or Affirm with this Court (No. 72-932). This Court vacated the judgment and remanded the case to the court below for further consideration in light of *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe* v. *Bolton,* 410 U.S. 179 (1973). (413 U.S. 909; A. 7) Upon remand, the Supreme Court of Virginia again affirmed the Appellant's conviction and stated, (214 Va. at 342, 200 S.E.2d at 680; J.S. 22a.):

> "Bigelow's is a First Amendment case. He was convicted not of abortion but for running in his newspaper a commercial advertisement for a commercial abortion agency. We held that government regulation of commercial advertising in the medical-health field was not prohibited by the First Amendment. We find nothing in the new decisions of *Roe* v. *Wade* and *Doe* v. *Bolton* which in any way affects our earlier view. So we again affirm Bigelow's conviction."

SUMMARY OF ARGUMENT

The sole issue in this case is whether a state may regulate purely commercial advertisements in the medical-health field. It does not involve a woman's constitutionally protected right to terminate her pregnancy by abortion. Nor does it involve the traditional role of newspapers of communicating information and disseminating opinion.

I. A state may regulate purely commercial advertising, *Pittsburgh Press* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973); *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942), especially when it relates to the medical-health field. *Williamson* v. *Lee Optical Co., Inc.,* 348 U.S. 483 (1955); *Semler* v. *Dental Examiners,* 294 U.S. 608 (1935).

A. The advertisement in question does no more than propose a sale of services. It expresses no opinion on whether, as a matter of social policy, a woman should bear a child; nor does it criticize the statute or its enforcement. Moreover, there is no editorial judgment present to strip the advertisement of its purely commercial nature.

B. The statute is clearly related to the state's interest in ensuring that the medical-health field be free of commercial practices and pressures.

II. In this case, where a line can be drawn between commercial and noncommercial conduct and the Appellant's conduct is clearly within the "hard core" of commercial activity unprotected by the First Amendment and prohibited by the statute, the Appellant lacks standing to raise the hypothetical rights of others. Furthermore, because the Supreme Court of Virginia has authoritatively construed the statute to prohibit commercial advertisements only, the continued existence of the statute, even before its amendment, could

not poss bly have had the effect of deterring others in the exercise of their First Amendment rights. Thus, there is no justification for an application of the overbreadth doctrine in this case.

ARGUMENT

I.

A State, Exercising Its Police Powers To Protect The Health, Safety And Welfare Of Its Citizens, May Prohibit Purely Commercial Advertisements Of Commercial Abortion Referral Agencies.

This Court made it clear in *Pittsburgh Press* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973), that First Amendment protection will not be afforded purely commercial advertising. See also *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942). State regulation of such advertisements is permissible, especially where the advertisements relate to the medical-health field. *Williamson* v *Lee Optical Co., Inc.,* 348 U.S. 483 (1955); *Semler* v. *Dental Examiners,* 294 U.S. 608 (1935). As the record amply shows, and as the Supreme Court of Virginia found, the advertisement under scrutiny here is of a purely commercial nature and thus is subject to the valid regulatory scheme embodied in § 18.1-63.

A.

The Advertisement Is Purely Commercial And Does No More Than Propose A Commercial Transaction.

It is conceded, as it must be, "that speech is not rendered commercial by the mere fact that it relates to an advertisement," *Pittsburgh Press, supra,* at 384, or by the fact that a newspaper is compensated for publishing the advertisement. *New York Times* v. *Sullivan,* 376 U.S. 254, 266 (1964). The crucial factor in determining the nature of an advertisement is whether it does "no more than propose a commercial transaction." *Pittsburgh Press, supra,* at 385. Like the advertisement in *Pittsburgh Press,* the advertisement here can only be classified as purely commercial.

The advertisement expressly extends the offer by a commercial abortion referral agency to pregnant women to make all arrangements and to secure immediate placement in a hospital or clinic for an abortion. These services, however, are not supplied for free. As prominently mentioned in the advertisement, these services will be performed "at low cost." The advertisement, therefore, can only be viewed as a proposal for the sale of services.

> The printed words, whether read literally or rhetorically, can only mean that the agency, for a fee, will make the necessary business arrangements with doctors and hospitals or clinics to secure an abortion for the customer. Thus, the commercial nature of both the advertiser and the advertisement is patently revealed. 213 Va. at 193, 191 S.E.2d at 174-75; J.S. 4a.

While conceding that the advertisement proposes a commercial transaction, Brief for Appellant at 28, the Appellant contends that because of its content and the controversy surrounding its subject matter, the advertisement cannot be characterized as purely commercial. The advertisement did contain two lines in relatively small print which stated that "Abortions are now legal in New York" and "There are no residency requirements." One could hardly expect less, however, from an agency that was trying to induce individuals to purchase its services. While the Appellant would have the Court isolate and focus on these two lines apart from the balance of the advertisement, they must be considered in the context in which they appear. Of course, in another context these words might partake of some informational value. Here, in the context of the advertisement in question,

these lines constitute no more than an integral part of the overall commercial solicitation.[3] To accord them any greater dignity would be to transform a commercial advertisement into an informational bulletin. Likewise, the statement appearing at the end of the advertisement, "We will make all arrangements for you and help you with information and counseling," when read in the context in which it appears, is merely an elaboration on the description of services which will be made available for a fee.

In his brief, the Appellant further contends that the mere running of the advertisement constituted an implicit editorial opinion on the subject matter involved. The most obvious and direct response to this contention is that it is totally lacking for support in the record In addition, it cannot be said that this kind of alleged editorial judgment "strip[s] commercial advertising of its commercial character." *Pittsburgh Press, supra,* at 387. For this Court to hold otherwise would lead to the inevitable result that once any commercial advertisement is accepted for publication, it automatically becomes noncommercial speech. Thus, the distinction between commercial and other speech would be rendered totally meaningless.

The record will also not support a suggestion that § 18.1-63 was passed with any purpose of muzzling or curbing the press. Nor does the Appellant argue that the statute threatens the financial stability of the newspaper or impairs

[3] Indeed, the Appellant concedes that "the ad was more than a discussion supporting the idea of abortion, or calling for efforts to persuade a legislature to legalize abortion." Brief for Appellant at 15.

in any significant way the newspaper's ability to be published and distributed. Furthermore, the statute does not reach the layout or organizational decisions of the newspaper.

In sum, then, the Court is not confronted in this case with the traditional role of the press of disseminating information and communicating opinion. See *New York Times* v. *Sullivan, supra,* at 266. The advertisement does not express a position on whether, as a matter of social policy, a woman should bear a child, nor does it criticize the statute or its enforcement. The advertisement here does not even remotely resemble the advertisement in *New York Times* v. *Sullivan*. Quite simply, it does no more than propose a commercial transaction. Thus, the advertisement is one of the "classic examples of commercial speech," *Pittsburgh Press, supra,* at 385, which is in no way stripped of its commercial nature by editorial judgment. *Capitol Broadcasting Co.* v. *Acting Attorney General,* 333 F.Supp. 582 (D.D.C. 1971), aff'd, 405 U.S. 1000 (1972).[4] As pure commercial speech, the advertisement is subject to regulation by the Commonwealth. *Pittsburgh Press, supra; Valentine* v. *Chrestensen, supra.* And "a newspaper will not be insulated from the otherwise valid regulation of economic activity merely because it also engages in constitutionally protected dissemination of ideas." *United States* v. *Hunter,* 459 F.2d 205, 212 (4th Cir. 1972), *cert denied,* 409 U.S. 934. For the Court to reverse the Appellant's conviction, it

[4] Cases such as *Capitol Broadcasting, New York State Broadcasters Ass'n.* v. *United States,* 414 F.2d 990 (2nd Cir. 1969), *cert. denied,* 396 U.S. 1061 (1970), and *Banzhaf* v. *F.C.C.,* 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom., Tobacco Institute, Inc.* v. *F.C.C.,* 396 U.S. 842 (1969), are also significant in their recognition that advertising can be regulated although the activity sought to be advertised is legal. See also *Valentine* v. *Chrestensen, supra.*

would have to repudiate the commercial speech doctrine most recently stated in *Pittsburgh Press*.

B.

THE STATUTE IS A VALID EXERCISE OF THE POLICE POWER OF THE STATE.

The standard of review to be applied to the statute in question has been clearly set forth by the Court in *McDonald* v. *Board of Election Com'rs.*, 394 U.S. 802, 809 (1969):

> "The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to ascertain their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them."

Quite clearly, § 18.1-63 meets this test.[5]

The Commonwealth has a definite and strong interest in seeing that the pregnant women in Virginia receive proper medical care. As stated by the Supreme Court of Virginia, 213 Va. at 196, 191 S.E.2d at 176; J.S. 7a:

> "Focusing attention upon Code § 18.1-63, the statute here in question, we emphasize that it deals with abortion, a matter vitally affecting public health and welfare and in the important realm of medicine. It is clearly within the police power of the state to enact reasonable measures to ensure that pregnant women in Virginia who decide to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder. And the state is rightfully interested in seeing that Virginia women who do decide to have abortions obtain proper medical care and do not fall into the hands of those interested only in financial gain, and not in the welfare of the patient."

[5] Should the Court determine that the appropriate test is compelling state interest, the Commonwealth submits that it meets that test also. The compelling state interest is amply demonstrated by the New York cases. See text *infra* at 13-14.

As noted by the court below, the necessity for and reasonableness of the statute is made obvious by an examination of the New York State experience following the legalization of abortion. After the passage of New York's liberalized abortion law, there grew a spate of abortion referral agencies, all limited to referrals to doctors, clinics and hospitals for the purpose of obtaining abortions. In terms of dollars and cents, the success of these enterprises was nothing short of phenomenal. See *S.P.S. Consultants, Inc.* v. *Lefkowitz*, 333 F. Supp. 1373, 1377 (S.D. N.Y. 1971) (three-judge court). In *S.P.S. Consultants*, the court rejected attacks based on the First and Fourteenth Amendments against a statute prohibiting the operation of for-profit abortion referral agencies. The facts of that case show that advertising directed to out-of-state women contributed greatly to the success of these agencies. *Id.* at 1377. Perhaps this statement of a state senator quoted in *S.P.S. Consultants, supra*, at 1378, best describes the situation:

> "Because New York State has the most liberal abortion statute within the Continental United States, thousands of women from all over the country are coming into New York State, and particularly New York City, for abortions. We were astonished to learn at our Session last week that most of these women came here through referral agencies who advertise nationally.

> These agencies, for a sizable fee, make all abortion arrangements for a patient. We also learned that certain hospitals give discounts to these lucrative, profit-making organizations. Thus, at the expense of desperate, frightened women these agencies are making a huge profit—some, such a huge profit that our Committee members were actually shocked."

The Supreme Court of Virginia also referred to the case of *State* v. *Mitchell,* 321 N.Y.S.2d 756 (1971) and *State* v. *Abortion Information Agency, Inc.,* 323 N.Y.S.2d 597 (1971), which disclose that agencies were soliciting patients for and splitting fees with doctors and were acting as middlemen for doctors. They also disclose that agency personnel lacked medical training and that follow-up procedures after abortion were absent.

In light of the practices surrounding abortion referral agencies, it cannot be fairly said that § 18.1-63 is unrelated to a legitimate state end. As stated by the court below, 213 Va. at 197, 191 S.E.2d at 177; J.S. 9a:

> "It is against the evils of such practices as are disclosed by the New York cases that the advertisement restriction in Code § 18.1-63 is designed to protect. This State has a real and direct interest in ensuring that the medical-health field be free of commercial practices and pressures, and we hold that Code § 18.1-63 is a reasonable measure directed to that purpose. *Semler* v. *Dental Examiners, supra;* 294 U.S. 612-13."

The Commonwealth submits that the findings of the Supreme Court of Virginia are eminently correct and should be sustained by this Court.

The medical-health field has long been established as an appropriate field for the exercise of the police power of the states. See e.g., *North Dakota State Bd. of Pharmacy* v. *Synder's Drug Stores, Inc.,* 414 U.S. 156 (1973), *Williamson* v. *Lee Optical Co., Inc., supra; Barsky* v. *Board of Regents,* 347 U.S. 442 (1954); *Semler* v. *Dental Examiners, supra.* The General Assembly of Virginia, exercising that power, enacted § 18.1-63. It cannot be doubted that in light of the findings of the Supreme Court of Virginia, the statute is a reasonable and valid exercise of that power.

II.

The Overbreadth Doctrine Is Not Applicable To This Case.

The Appellant has mounted an additional attack upon § 18.1-63 contending that the statute is unconstitutional because of overbreadth.[6]. He alleges that:

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[6] In his brief, the Appellant also asserts that the statute runs afoul of three constitutional interests in addition to the First Amendment—the right of privacy, the right to travel and the "limitations upon the power of the states to penalize its citizens for actions unlawful in the state of residency but lawful when performed outside that state." Brief for Appellant at 18. The most immediate answer to these contentions is that they were not presented to the court below. J.S. 3a and 17a. Furthermore, these "constitutional interests" are not involved in this case. Section 18.1-63 does not regulate abortions, nor, as authoritatively construed by the court below, does it prevent the free flow of abortion information. Therefore, a woman's right to have an abortion is not an issue in this case. 214 Va. 341, 200 S.E.2d 680; J.S. 22a. Likewise, neither the statute nor the record will support an attack bottomed on the right to travel. Lastly, there is no conceivable manner in which § 18.1-63 can be read to prohibit or punish the obtaining of abortions outside Virginia. Appellant's contentions, therefore, are frivolous. This is, and always has been, a First Amendment case:

> "Bigelow's is a First Amendment case. He was convicted not of abortion but for running in his newspaper a commercial advertisement for a commercial abortion agency." 214 Va. 341, 200 S.E.2d 680; J.S. 22a.

For this reason, the Appellant's suggestion, Brief for Appellant at 20 n. 10, of a retroactive application of *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Doe* v. *Bolton,* 410 U.S. 179 (1973), is totally irrelevant. This probably accounts for the suggestion being relegated to footnote status. (footnote cont'd)

> "By it terms, it prohibits a speech urging that women have a right to obtain an abortion; it prevents a husband from discussing the possibility of an abortion with his pregnant wife; it prevents a Virginia doctor from suggesting that a patient obtain a legal abortion in Virginia or elsewhere; it suppresses abortion information supplied by a nonprofit, noncommercial agency; in fact, it prohibits appellant from writing and publishing an editorial which could be said to encourage abortion." Brief for Appellant at 35.

Facial overbreadth is an exception to the principle embodied "in the traditional rules governing constitutional adjudication," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973), that parties lack standing to challenge a statute on the ground of possible unconstitutional applications in hypothetical cases. Because allowing attacks on the basis of overbreadth is a departure from this time-honored principle, see e.g., *United States* v. *Raines*, 362 U.S. 17, 20-22 (1960), and because it creates a "judicial-legislative confrontation,"[7] it should be "employed by the Court sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, *supra*, at 613. Whether the rationale[8] underlying the overbreadth doctrine is said to be the chilling effect on the exercise of First Amendment rights, see e.g., *Gooding* v. *Wilson*, 405 U.S. 518, 521 (1972), or the possibility of "selective enforcement against unpopular causes," see e.g., *NAACP* v. *Button*, 371 U.S.

Of course, Virginia is bound to follow this Court's decisions in *Roe* v. *Wade* and *Doe* v. *Bolton*. In fact, Virginia's statutes regulating abortion were immediately interpreted after those decisions were handed down. See Report of the Attorney General of Virginia (1972-1973), at 1.

[7] Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L.Rev. 844, 852 (1970).

[8] See Torke, *The Future of First Amendment Overbreadth*, 27 Vand. L.Rev. 289, 295 (1974).

415, 435 (1963),[9] there is no basis for its application in this case.

As clearly demonstrated by the Supreme Court of Virginia, the Appellant's conduct was purely commercial. Under this state of facts, the Court's decision in *Breard* v. *Alexandria*, 341 U.S. 622 (1951), embodies the correct principle to be applied in this case. In *Breard* a door-to-door magazine salesman attacked on First Amendment grounds an ordinance prohibiting such salesmen from door-to-door solicitation without prior consent. In rejecting the attack, the Court stated: "Only the press or oral advocates of ideas could urge this point. It [is] not open to the solicitors for gadgets or brushes." *Id.* at 641. The Appellant contends that *Breard* is inapplicable here because the Appellant is a member of the press. This simplistic approach, however, overlooks the fact that this case does not concern the traditional role of the press of disseminating information and communicating opinion. In this case, the Appellant was involved in a commercial activity. As stated by the Supreme Court of Virginia, 213 Va. at 198, 191 S.E.2d at 178; J.S. 10a:

> "Thus, where, as here, a line can be drawn between commercial and noncommercial conduct and it clearly appears that the prohibited activity is in the commercial area, the actor does not have standing to rely upon the hypothetical rights of those in the noncommercial zone in mounting an attack upon the constitutionality of a legislative enactment. So we deny Bigelow standing to assert the rights of doctors, husbands, and lecturers."

The Appellant, therefore, should be denied standing to raise the hypothetical rights of others since his conduct was squarely within the "hard core" of commercial activity un-

[9] But see *Lewis* v. *City of New Orleans*, 415 U.S. 130, 142 n.2 (1974) (Blackmun, J., dissenting).

protected by the First Amendment and prohibited by the statute. *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 378 (1971) (Harlan, J., concurring). Cf. *Plummer* v. *City of Columbus*, 414 U.S. 2, 4 (1973) (Powell, J., dissenting).

Furthermore, facial overbreadth should not be applied here because the Supreme Court of Virginia has placed a limiting construction on the challenged statute. "Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick* v. *Oklahoma*, *supra*, at 613. Authoritatively construing § 18.1-63, the court below placed a limiting construction on the statute and held that it did not encompass the hypothetical cases raised by the Appellant. 213 Va. at 198, 191 S.E.2d at 177; J.S. 10a.

That the Court below construed the statute to permit the free flow of noncommercial speech and to prohibit only commercial is also apparent from its treatment of *Mitchell Family Planning, Inc.* v. *City of Royal Oak*, 335 F. Supp. 738 (E.D. Mich. 1972), a case relied on by the Appellant in the court below. In *Mitchell*, the court declared unconstitutional an ordinance prohibting the advertising of "any information concerning the producing or procuring of an abortion." The advertisement in question in that case merely offered "Abortion Information" and gave two telephone numbers that could be called. The Supreme Court of Virginia was quick to point out that both the ordinance prohibiting the mere dissemination of information and the noncommercial advertisement in *Mitchell* were quite different from the statute and advertisement under consideration here. 213 Va. at 197, 191 S.E.2d at 177; J.S. 8a.

Equally compelling is the court's language referring to the statute as "advertising legislation," 213 Va. at 196, 191 S.E.2d at 176; J.S. 7a, which is directed to "commercial practices, and pressures." 213 Va. at 197, 191 S.E.2d at 177; J.S. 9a. In light of the express language in and the entire tenor of the opinion of the court below, it cannot be fairly said that the court did not have the proper sensitivity for the freedoms of speech and press protected by the First Amendment, or that it did not limit the application of the statute to commercial advertisements. And, of course, "the words of Virginia's highest court are the words of the statute. *Hebert* v. *Louisiana*, 272 U.S. 312, 317. [This Court is] not left to speculate at large upon the possible implications of bare statutory language." *NAACP* v. *Button*, *supra*, at 432.

Therefore, this is not a case in which "the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights." *Coates* v. *City of Cincinnati*, 402 U.S. 611, 620 (1971) (White, J., dissenting). A blind application of the overbreadth doctrine in this case could not conceivably affect the rights of any one not before the Court, but would simply result in a windfall for the Appellant.[10]

[10] An application of the overbreadth doctrine in this case would also amount to no more than an academic execrise. The *Amici*, Brief for *Amici Curiae* at 8, and apparently the Appellant, Brief for Appellant at 22, concede "that advertisements which aid or abet *illegal* activity may be prohibited." Brief for *Amici Curiae*, *supra*. Section 18.1-63 has been amended and in its present form refers only to abortions to be performed in Virginia which are illegal in Virginia. Because in its amended form § 18.1-63 would prohibit advertisements aiding and abetting an illegal activity, the Appellant and *Amici* would apparently agree that the statute as presently drawn would not run afoul of the First Amendment. Thus, in light of the amendment, justification for the application of the overbreadth doctrine is lacking.

CONCLUSION

The decision of the Supreme Court of Virginia is clearly in accord with the precedents laid down by this Court. The Commonwealth respectfully submits that this Court cannot, consistently with the principles that it has enunciated in *Valentine* and *Pittsburgh Press*, reverse the judgment of the court below. The Commonwealth respectfully requests that this Court adhere to its principles and affirm the judgment of the Supreme Court of Virginia.

Respectfully submitted,

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October 21, 1974.

Supreme Court, U. S.
FILED
OCT 18 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1309

JEFFERY COLE BIGELOW,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

BRIEF OF VIRGINIA RIGHT TO LIFE, INC. AMICUS CURIAE

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IN THE

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JEFFERY COLE BIGELOW,

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

BRIEF OF VIRGINIA RIGHT TO LIFE, INC. AMICUS CURIAE[1]

INTRODUCTION

Virginia Right To Life, Inc., hereinafter referred to as (VRTL), is a non-stock, non-profit, non-sectarian,

[1] Letters of Consent, from the Attorney General For The Commonwealth of Virginia, Attorney for Appellee and from American Civil Liberties Union Foundation attorney for Appellant, to the filing of this brief have been filed with the Clerk. We address our remarks in this Brief to the Question Presented in the Brief of the Appellant.

Virginia Corporation organized for educational purposes. Membership is open to all Virginians.

The Corporation's primary purpose is to educate the public on the value and dignity of the *corporeal*[2] human body, which commences biological life from the moment of conception and continues to the final brain activity, an unbroken "Life Line" from the "Womb to the Tomb."

VRTL is unequivocally opposed to the destruction of one human life for the social convenience of another, no matter at what point of time in the womb to tomb life line, and no matter how pressing that social problem may appear to be.

A decision and rule of law[3] by this Court upholding the Court below is required to protect the people of Virginia and at least eighteen other states,[4] from commercial practices of laymen selling medical abortion services without regulation or license by state authority.

It is believed this Court will take notice of the operation of abortion referral agencies in the District of

[2] A term descriptive of such things as have an objective material existence; perceptible by the senses of sight and touch, possessing a real body. Opposed to incorporeal and spiritual. *Sullivan v. Richardson*, 33 Fla. 1, 14 So. 692.

[3] The word may mean or embrace * * * general rule of human action, taking cognizance only of external acts (physical or corporeal; as distinguished from mental or moral), enforced by a determinate authority, which authority is human, and among human authorities is that which is paramount in a political society. *Holl. Jur.* 36; *Provident Life and Accident Ins. Co. v. Campbell*, 18 Tenn. App. 452, 79 S.W.2d, 292, 296.

[4] See ennumeration of states with similar or comparable laws, page 6 infra.

Columbia which advertise their services daily in a Northern Virginia community newspaper.[5]

STATEMENT OF THE CASE

Jeffery C. Bigelow was tried by the local court, sitting without a jury, and convicted of encouraging or prompting the procuring of abortion by publication, advertisement, sale, or circulation of the Virginia Weekly, a newspaper published in Charlottesville, in violation of Code 18.1-63. He was fined $500, $350 of which was suspended upon condition that he not further violate 18.1-63.

The case was appealed to the Virginia Supreme Court upon a stipulation of fact and certain exhibits. Bigelow had direct responsibility for the publication and circulation in Albemarle County of the February 8, 1972 issue of the *Virginia Weekly*. The issue contained the following advertisement:

[5] Northern Virginia Sun.

UNWANTED PREGNANCY
LET US HELP YOU

Abortions are now legal in New York
There are no residency requirements

FOR IMMEDIATE PLACEMENT IN ACCREDITED HOSPITALS AND CLINICS
AT LOW COST

Contact

WOMEN'S PAVILION
515 Madison Avenue
New York, N. Y. 10022

or call any time

(212) 371-6670 or (212) 371-6650
AVAILABLE 7 DAYS A WEEK

STRICTLY CONFIDENTIAL. We will make all arrangements for you and help you with information and counseling.

On September 1, 1972, the Supreme Court of Virginia 213 Va. 191, 191 S.E.2d 173 upheld the constitutionality of Sec. 18-1-63 and its applicability to the above advertisement.

ARGUMENT

A. A Commercial advertisement such as the one involved here has no protection under the First Amendment.

Unless the advertisement can be divided into the commercial and non-commercial portion, the rule that a commercial ad is not within the Amendment is clear. The Court below rightly held that the subject matter and the ad were patently commercial and involved the

medical health field, a field clearly within the area of State regulation. See *Valentine v. Christensen*, 316 U.S. 52, 54.

B. Virginia Code Section 18-1-63 is not overbroad.

The ad supra is patently commercial on its face. It clearly is an offer in the medical health field to act as a broker for abortion services and gives a contact telephone number through which an acceptance of the offer may be made. Whether the client responding to the advertisement or the facility providing the medical services pays the "fee," "kickback," or "donation" to the referral agent does not diminish the agent's role of broker. As such it does not offend the First and Fourteenth Amendments as the Court below rightly held. *Beard v. Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 94 L.Ed. 1233.

C. Code Section 18-1-63 is a reasonable measure designed to control the exploitation and sale of unlicensed medical services.

The law was applied to an underground newspaper operating out of an address in the city where the State University is located. Most Freshmen at the University at the time were eighteen and some were minors.

The Virginia law is worded much the same as similar

laws in at least eighteen other states,[6] and as such appears to be a reasonable exercise of legislative power. The Court below rightly upheld its Constitutionality.

D. The meaning of the word "abortion" as used in Section 18-1-63 should be determined under local law.

The Virginia abortion statute immediately precedes Section 18-1-63. The two sections are interrelated and the word "abortion" would appear to have the same meaning in *both* sections.

The meaning of the term must be reached with the use of our new knowledge.

As stated, supra page 2, the Womb to Tomb Life Line is now universally accepted. It defies former explanations or theories. It has dissolved the old doctrines of ancient philosophers, theologians, medical theorists and moralists. It is explained by:

> Dr. A.W. Liley, research professor in fetal physiology at National Women's Hospital, Auckland, New Zealand, a man renowned throughout the world as one of the principal founders and masters of the relatively new field of fetology. Dr. Liley writes:
>
> "In a world in which adults control power and purse, the fetus is at a disadvantage being small, naked, nameless and voiceless. He has no one except sympathetic adults to speak up for him and

[6] Arizona, Arkansas, Colorado, Hawaii, Illinois, Iowa, Louisiana, Maryland, Minnesota, Mississippi, Missouri, New Jersey, Nevada, Kentucky, Ohio, Pennsylvania, Vermont, Wisconsin.

defend him—and equally no one except callous adults to condemn and attack him. Mr. Peter Stanley of Langham Street Clinic, Britain's largest and busiest private abortorium with nearly 7,000 abortions per year, can assure us the 'under 28 weeks the fetus is so much garbage—there is no such thing as a living fetus' Dr. Bernard Nathanson, a prominent New York abortionist, can complain that it is difficult to get nurses to aid in abortions beyond the twelfth week because the nurses and often the doctors emotionally assume that a large fetus is more human than a small one. But when Stanley and Nathanson profit handsomely from abortion we can question their detachment because what is good for a doctor's pocket may not be best for mother or baby.

Biologically, at no stage can we subscribe to the view that the fetus is a mere appendage of the mother. Genetically, mother and baby are *separate individuals* from conception. Physiologically, we must accept that the conceptus is, in very large measure, in charge of the pregnancy, *in command* of his own environment and *destiny* with a tenacious *purpose*.

It is the early embryo who stops mother's periods and proceeds to induce all manner of changes in maternal physiology to make his mother a suitable host for him. Although women speak of their waters breaking or their membranes rupturing, these structures belong to the fetus and he regulates his own amniotic fluid volume. It is the fetus who is responsible for the immunological success of pregnancy—the dazzling achievement by which fetus and mother, although immunological foreigners, tolerate each other in

parabiosis for nine months. And finally it is the fetus, not the mother, who decides when labour should be initiated.

One hour after the sperm has penetrated the ovum, the nuclei of the two cells have fused and the genetic instructions from one parent have met the complementary instructions from the other parent to establish the whole design, the inheritance of a new person.

The one cell divides into two, the two into four and so on while over a span of 7 or 8 days this ball of cells traverses the Fallopian tube to reach the uterus.

On reaching the uterus, this young individual implants in the spongy lining and with a display of physiological power supresses his mother's menstrual period.

This is his home for the next 270 days and to make it habitable the embryo develops a placenta and a protective capsule of fluid for himself.

By 25 days the developing *heart starts* beating, the first strokes of a pump that will make 3,000 million beats in a lifetime.

By 30 *days* and just 2 weeks past mother's first missed period, the baby, ¼ inch long, has a brain of *unmistakable human proportions*, eyes, ears, mouth, kidneys, liver and umbilical cord and a heart pumping blood he has made himself.

By 45 days, about the time of mother's second missed period, the baby's *skeleton is complete*, in cartilage not bone, the buds of the milk teeth appear and he makes his first movements of his limbs and body–although it will be another 12 weeks before mother notices movements.

By 63 days he will grasp an object placed in his palm and can make a fist." Cong. Rec., Vol. 119, May 31, 1973, No. 82 re S.J. RES. 119.

A new day of knowledge has emerged.

And this generation of Americans must fulfill their duty and act upon this new knowledge in order to fulfill their Constitutional duty to Posterity.[7]

The new duty is to recognize as "persons" corporeal human beings from the moment and hour of their conception and continually to the natural and final demonstrable human brain activity of that human being.

Under this formula and definition of abortion, the advertisement would clearly fall within the statute and the Court below rightly upheld the conviction.

Alternatively the Tenth Amendment precludes this appeal since the Supreme Court is without jurisdiction and the judgment below must stand.

There is no provision in the Federal Constitution which gives the Supreme Court jurisdiction over a local issue.[8] A case must be made out under some particular provision of the Constitution. Here the Appellant claims his is under the First Amendment.

But as we have previously pointed out, the advertisement was clearly commercial advertising and under decisions of this Court the First Amendment has not been offended. *Valentine v. Christensen*, 316 U.S. 52, 54.

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[7]Preamble U.S. Constitution: * * * and secure the blessings of liberty to ourselves and our posterity. * * *

[8]Practice of law: Emmons v. Schmitt, D.C. Mich. 58 F. Supp. 869, A # 149 F.2d 869 cert den. 66 S. Ct. 59, 326 U.S. 746 Practice of Medicine: Ghadiali v. Delaware State Medical Soc. D.C. Delaware, 48 F. Supp. 789.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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October 18, 1974

Supreme Court, U. S.
FILED
SEP 10 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1309

JEFFREY COLE BIGELOW,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

BRIEF FOR *AMICI CURIAE* PUBLIC CITIZEN AND CENTER FOR WOMEN POLICY STUDIES

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ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

BRIEF FOR *AMICI CURIAE* PUBLIC CITIZEN AND CENTER FOR WOMEN POLICY STUDIES

INTERESTS OF THE *AMICI CURIAE*

Amici Public Citizen and the Center for Women Policy Studies are representing the interests of those persons seeking to preserve their First Amendment right to receive advertisements containing information about abortions, so that they may effectively and intelligently exercise this constitutionally protected right to terminate an unwanted pregnancy.[1]

[1] It is beyond dispute that the First Amendment protects the interests of the reader and listener just as energetically as the interests of the publisher and speaker. *E.g., Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

Public Citizen is a non-profit organization supported entirely by public donations. In the slightly more than three years since it began soliciting public support, Public Citizen has received donations from more than 100,000 persons. It engages in a wide variety of activities on behalf of consumers, and it is particularly concerned about laws which prohibit certain advertising, thereby interfering with consumers' access to vital information. Thus, Public Citizen has assisted several state consumer organizations prepare surveys demonstrating the pernicious effect which laws prohibiting the advertising of prescription drug prices have on drug prices. Attorneys for Public Citizen represented the Virginia Citizens Consumer Council and the Virginia State AFL-CIO in a successful challenge to the Virginia law which prohibited the advertising of information about prescription drug prices.[2]

Additionally, one of Public Citizen's component organizations, the Health Research Group, has published a directory containing factual information about physicians in Prince George's County, Maryland.[3] Because Maryland law prohibits advertising by physicians, a substantial number of Prince George's County doctors refused to supply information for publication in the directory. Attorneys for Public Citizen are representing several consumer organizations in a First Amendment challenge to the Maryland

[2] *Virginia Citizens Consumer Council v. State Board of Pharmacy*, 373 F.Supp. 683 (E.D. Va. 1974) (three-judge court).

[3] The information in the directory includes the physician's educational background, his availability on weekends and vacations, fees for some standardized laboratory tests, whether he accepts Medicare patients, the languages he speaks, and other information which is not readily available to a person in need of a doctor.

law as it impedes the effective preparation of the doctor's directory.[4]

The Center for Women Policy Studies is a non-profit organization which has received financial support from the Ford Foundation, the United Methodist Women, the Edna McConnell Clark Foundation, the Law Enforcement Assistance Administration and other organizations. It engages in research and projects relating to the status of women in society. The Center seeks to insure that a woman who decides to have an abortion has access to relevant information which will assist her in effectuating that decision in a manner consistent with her health and welfare.

The interests presented by the *amici* in this case are the interests of consumers in having access to the full spectrum of available information. While the informational interests of consumers might be similar to the commerical interests of advertisers, they are not necessarily identical.[5] Moreover, as one commentator expressed it, "[s]ince advertising performs a significant function for its recipients, its values are better viewed with the consumer, rather than the seller, as the frame of reference." Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash. L. Rev. 429, 434 (1971).

[4] *Public Citizen, et al. v. Commission on Medical Discipline of Maryland, et al.*, Civil Action No. 74-56B, D. Md. A copy of the complaint is attached as Appendix A to this brief.

[5] *Compare Patterson Drug Co. v. Kingery*, 305 F.Supp. 821 (W.D. Va. 1969) (three-judge court), *with Virginia Citizens Consumer Council v. State Board of Pharmacy*, 373 F.Supp. 683 (E.D. Va. 1974) (three-judge court).

Finally, we believe it is important for this Court to consider the interests of recipients of information because "[i]t would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan J., concurring opinion).

SUMMARY OF ARGUMENT

Appellant Jeffrey C. Bigelow was convicted of violating section 18.1-63 of the Virginia Code because he published an advertisement which provided information about abortions. It is the position of the *amici* that section 18.1-63 of the Code of Virginia violates the First Amendment because (1) it inhibits the dissemination of information regarding the constitutionally protected right to have an abortion; and (2) Virginia could accomplish its legitimate objectives in protecting the health, safety and welfare of its women with laws which do not as seriously infringe on First Amendment rights.

In upholding the conviction and ruling that section 18.1-63 did not violate the First Amendment, the Supreme Court of Virginia relied primarily on *Valentine v. Chrestensen*, 316 U.S. 52 (1942), and *United States v. Hunter*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).[6] We submit that *Hunter* is inapplicable since it involved a law prohibiting advertisements which aided and abetted illegal conduct — *viz.*, racial discrimination in housing — and that the decision in *Valentine* that commercial speech is not protected by the First Amendment has been substantially eroded by subsequent decisions of this Court.

[6] App. 4a-5a. The opinion of the Supreme Court of Virginia was reproduced in the appendix to Appellant's Jurisdictional Statement. References herein to that opinion will be to that appendix.

Whatever the current validity of *Valentine*, it does not, we suggest, support a law which interferes with the dissemination of vital information about a constitutionally protected right merely because that information appears in an advertisement. Moreover, there are positive reasons why advertising — even of a commercial nature — warrants the same First Amendment protection as other forms of speech, especially when the advertisement conveys important information as it did here.

ARGUMENT

I. PROHIBITING THE PUBLICATION OF ADVERTISEMENTS CONTAINING INFORMATION WHICH ASSISTS THE RECIPIENT IN THE EXERCISE OF CONSTITUTIONALLY PROTECTED RIGHTS VIOLATES THE FIRST AMENDMENT.

A. The First Amendment Does Not Exclude Advertising From Its Protection

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), this Court outlined those

> . . . narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-572 (footnotes omitted). Since advertising falls within none of these categories, it is presumptively entitled

to be protected by the First Amendment.[7] Obscene advertisements may be constitutionally punished, *see Hamling v. United States*, ___ U.S. ___, 94 S.Ct. 2887 (1974), as may ads which are false or misleading, *see Lynch v. Blount*, 330 F.Supp. 689 (S.D.N.Y. 1971) (three-judge court), *aff'd*, 404 U.S. 1007 (1972). But advertisements *per se* are not beyond the pale of the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The Supreme Court of Virginia relied heavily on *Valentine v. Chrestensen*, 316 U.S. 52 (1942), in support of its conclusion that section 18.1-63 is not unconstitutional. In *Valentine* the sponsor of a trip on a submarine was charged with violating an anti-litter provision of the sanitation code of New York City prohibiting the distribution in the streets of commercial and business advertising leaflets. The Court held that a prohibition against the dissemination in the City's streets of a leaflet touting the trip was not unconstitutional. As Mr. Justice Douglas has observed, the *Valentine* "ruling was casual, almost off hand. And it has not survived reflection." *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (concurring opinion). Just last term, Mr. Justice Brennan declared that "[t]here is some doubt concerning whether the 'commercial speech' distinction announced in *Valentine v. Chrestensen*, 316 U.S. 52

[7] Several lower courts have held that advertising is protected by the First Amendment. *E.g., Hiett v. United States*, 415 F.2d 664 (5th Cir. 1969), *cert. denied*, 397 U.S. 936 (1970) (advertisements designed to solicit Mexican divorce business); *Associated Students For the University Of California At Riverside v. Attorney General*, 368 F. Supp. 11 (C.D. Calif., 1973) (three-judge court; abortion advertisements); *Atlanta Cooperative News Project v. United States Postal Service*, 350 F.Supp 234 (N.D. Ga. 1972) (three-judge court; abortion advertisements in a newspaper).

(1942), retains continuing validity." *Lehman v. City of Shaker Heights*, ___ U.S. ___, 94 S. Ct. 2714, 2723, n. 6 (1974) (dissenting opinion).

Not only has the validity of the *Valentine* ruling been directly questioned, but it has been tacitly undermined and considerably narrowed by subsequent decisions of this Court. For example, in *Talley v. California*, 362 U.S. 60 (1960), this Court held unconstitutional an ordinance which prohibited the distribution of handbills unless they had printed on them the names and addresses of the persons who prepared them. The handbills involved urged a commercial boycott of merchants who discriminated against minorities. The dissenting justices believed the law was constitutional for several reasons including their view that "commercial handbills may be declared verboten. Valentine v Chrestensen. . . ." *Id.* at 71. The majority justices, however, never mentioned *Valentine* and declared that only handbills which are obscene, libelous, or which present false or fraudulent advertising are not protected by the First Amendment. *Id.* at 64.

In two other recent cases, the Court has upheld restrictions on advertising without ever mentioning *Valentine*. In *Rowan v. United States Post Office*, 397 U.S. 728 (1970), the Court upheld the constitutionality of a law allowing addressees to have their names deleted from the mailing lists of those sending obscene advertisements. And in *Lehman v. City of Shaker Heights, supra*, this Court sustained the constitutionality of a municipal ordinance which prohibited paid political advertising on the public transit system. Both of those opinions contained lengthy discussions about the First Amendment issues, discussions which we submit would have been unnecessary if advertising is simply not a form of speech entitled to constitutional protection.

This Court's recent decision in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), has also narrowed *Valentine* and strongly suggests that not all commerical advertisements are undeserving of First Amendment protection. Mr. Justice Powell, writing for the five majority justices, recognized that there might be instances in which the exchange of information in the commercial realm would be of sufficient value to bring it within the First Amendment, but concluded that "[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal . . . is altogether absent when the commercial activity itself is illegal. . . ." *Id.* at 389.[8] This holding that advertisements which aid or abet *illegal* activity may be prohibited is consistent with the First Amendment and with a bar against fraudulent advertising. Since it is not illegal for a woman to have an abortion, at least during the first trimester of pregnancy, *Roe v. Wade*, 410 U.S. 113 (1973), the decision in *Pittsburgh Press* does not support the constitutionality of section 18.1-63, and its reasoning suggests the contrary conclusion.[9]

[8] It was also the illegal nature of the activity being advertised — *viz.*, racial discrimination in the sale or rental of housing — which resulted in the decision in *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972), another case principally relied upon by the Supreme Court of Virginia in the decision below.

[9] Even at the time of Mr. Bigelow's conviction, his advertisement was not aiding and abetting illegal activity because it was lawful for a Virginia woman to have an abortion in New York, which is where the advertised operation was to be performed. Moreover, today his ad would not violate section 18.1-63 for that section as amended in 1972 prohibits only those ads which encourage an abortion "in this State" which is prohibited by law.

B. Advertising Should Be Accorded The Same Status Within The First Amendment As Other Forms Of Speech

As we have demonstrated, *Valentine v. Chrestensen* has been substantially eroded and rightly so, we submit, because not only is there no reason why advertising should not be accorded the same status within the First Amendment as other forms of speech, but there are also positive reasons why it should be accorded such status.[10] In rejecting the argument that advertising is devoid of literary, artistic or other social value, and therefore less deserving of First Amendment protection, the Court of Appeals for the Ninth Circuit has recognized that "[a]dvertising performs an important First Amendment function in aid of communication." *United States v. Pellegrino*, 467 F.2d 41, 45 (9th Cir. 1972). Moreover, "advertising serves a legitimate educational function in that it is 'an immensely powerful instrument for the elimination of ignorance — comparable in force to the use of the book instead of oral discourse to communicate knowledge.' " Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash. L. Rev. 429, 433 (1971) (footnote omitted).

Advertising is an invaluable source of information for consumers.[11] For example, it informs persons about the wide discrepancy in prescription drug prices thus permitting

[10] *See Developments In The Law — Deceptive Advertising*, 80 Harv. L. Rev. 1005, 1027 (1967).

[11] For many people, advertised information will be of far more value than viewing "Carnal Knowledge," *see Jenkins v. Georgia*, ___ U.S. ___, 94 S.Ct. 2750 (1974), or reading *The Pentagon Papers*, *see New York Times Co. v. United States*, 403 U.S. 713 (1971), or stories of bloodshed and lust, *see Winters v. New York*, 333 U.S. 507 (1948).

them to maximize what may be a very limited income. *See Virginia Citizens Consumer Council v. State Board of Pharmacy*, 373 F.Supp. 683, 684-85 (E.D. Va. 1974) (three-judge court). Additionally, advertising may have the laudatory effect of lowering prices. For example, the Chairman of the Federal Trade Commission recently noted that "eyeglasses were 25% to 100% more expensive in states where sellers were not permitted to advertise." Address by Lewis A. Engman, Annual Meeting of the Antitrust Law Section of the American Bar Association, August 14, 1974. However, laws prohibiting advertising have been used to interfere with the efforts of a non-profit organization to publish for the benefit of persons in need of medical services factual information about physicians, such as whether he is available on weekends and vacations, what languages he speaks, whether he accepts Medicare patients, how long it takes to obtain a non-emergency appointment, and whether he makes house calls. (See Appendix A to this brief.)

Not only should advertising be constitutionally protected because of its value to society in general, but since the right of a woman to have an abortion is a constitutionally protected right, advertising which will assist a woman in exercising that right is particularly deserving of First Amendment protection. The advertisement involved in this case provided essential factual information to a Virginia woman who wished to have an abortion but could not legally obtain one in Virginia. Since some hospitals and many doctors still refuse to perform abortions, *see e.g., Doe v. Bellin Memorial Hospital*, 479 F.2d 756 (7th Cir. 1973), a woman in a town whose only hospital refuses to perform abortions, will be informed of their availability in New York. Additionally, if a woman who desires to have an abortion has not been a resident of Virginia for 120 days, she is unable

to have a legal abortion in Virginia and may wish to go to New York.[12] Or a pregnant woman may feel it necessary to go out-of-state for an abortion because of the prevailing anti-abortion sentiment where she lives. For whatever reasons, a woman who cannot or does not want to have an abortion in Virginia will learn from this advertisement that she may obtain an immediate abortion in New York, that the abortion will be performed in an accredited hospital or clinic, that her inquiry will remain confidential and that she will receive counseling. We submit that all of this information will be of obvious and considerable value to a woman who has decided to have an abortion, and that instead of prohibiting the dissemination of such information, it should be encouraged. The dissemination of information and opinion is the very function the First Amendment performs in our society, and there is, we submit, no reason to exclude its protection in this instance.

II. LAWS LESS RESTRICTIVE THAN SECTION 18.1-63 WOULD ACCOMPLISH VIRGINIA'S LEGITIMATE OBJECTIVES IN PROTECTING THE HEALTH, SAFETY AND WELFARE OF ITS WOMEN.

The Supreme Court of Virginia viewed the anti-advertising prohibition of section 18.1-63 as a "reasonable" measure designed (1) to advance Virginia's interest in not encouraging women to have abortions, and (2) to protect the health, safety and welfare of pregnant Virginia women. (App. 7a). We submit that the state does not have a constitutionally protected interest in not encouraging abortions and that it could accomplish its legitimate,

[12] Section 18.1-62.1 of the Code of Virginia (1974 Supplement) imposes numerous other restrictions on the performing of abortions.

health-related goals with laws which do not as seriously infringe on First Amendment rights.

Even assuming that the advertisement in this case is designed to encourage women to have abortions, that is not a justifiable reason for the state to prohibit it. Surely, a law which prohibited editorials or speeches encouraging abortions as a method of population control would be unconstitutional. The First Amendment's "basic guarantee is of freedom to advocate ideas[,]" and the state may not interfere with such advocacy because the ideas might be "contrary to the moral standards, the religious precepts, and the legal code of its citizenry." *Kingsley International Pictures Corp. v. Regents of Univ. of New York, 360 U.S.* 684, 688 (1959). And the fact that the message appears in an advertisement does not remove its First Amendment protection. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

Turning to Virginia's objective of promoting the health, safety and welfare of its pregnant women, it is not sufficient, as the Virginia Supreme Court thought, that section 18.1-63 might be a "reasonable" means of accomplishing it. Laws which infringe on fundamental rights must be narrowly drafted. *E.g., Roe v. Wade,* 410 U.S. 113 (1973); *Dunn v. Blumstein,* 405 U.S. 330 (1972); *Shapiro v. Thompson,* 394 U.S. 618 (1969); and *Talley v. California,* 362 U.S. 60 (1960). This Court has emphasized that "the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma,* 413 U.S. 601, 611-612 (1973) (citations omitted). In another case specifically involving

First Amendment rights, this Court held that "[t]he breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker,* 364 U.S. 479, 488 (1960) (footnote omitted). And in *Pittsburgh Press, supra,* the ordinance was upheld only as "narrowly drawn." 413 U.S. at 391.

We share the desire of the Commonwealth of Virginia to protect the health, safety and welfare of its pregnant women.[13] We submit, however, that Virginia has not demonstrated — because it cannot — that the prohibition of all advertising protects the health of a pregnant woman.[14] We also vigorously support the state's interest in prohibiting false or misleading advertising about abortions, but a law which permits advertising about abortions does not require that fraud, overreaching and misrepresentation be

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[13] Virginia already has laws which protect the health and safety of Virginia women seeking an abortion, and which do not infringe on any First Amendment rights. For example, section 18.1-62.1(b) of the Code of Virginia (1974 Supplement) requires that abortions be performed in hospitals which are accredited and licensed by the state health department. Although requiring that abortions be performed in approved hospitals or clinics would appear to be an adequate means of protecting the health and safety of a woman who has an abortion, Virginia might also consider a law requiring advertisements to indicate that the abortions will be performed in hospitals and clinics which comply with state law, as Mr. Bigelow's advertisement so indicated.

[14] The Supreme Court of Virginia apparently believes that proper medical care cannot be provided by those interested in financial gain, (App. 7a, 9a) a belief which is not supported by any evidence in the record, and which is inconsistent with Virginia's licensing of private profit-making hospitals and the practices of nearly all physicians.

tolerated. *See Note, Advertising, Solicitation and the Professional Duty to Make Legal Counsel Available*, 81 Yale L.J. 1181, 1188 (1972). Deceit and misrepresentation should be handled with laws narrowly drafted to punish that activity, not with blanket restraints on expression.[15] *See, e.g., Talley v. California*, 362 U.S. 60, 63 (1960).

Additionally, if Virginia could demonstrate that a doctor's "puffing" his superior ability to perform abortions would interfere with the health and safety of pregnant Virginia women, then it could draft a law narrowly directed to prohibit advertisements which proclaim professional superiority. *Cf., Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935). For example, Virginia has a law which prohibits a pharmacist from making statements "about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare." Code of Virginia § 54-524.35(2) (1974 Supplement).

Not only are *amici* opposed to false and misleading advertising, but we would also not want to see blinking neon signs along the nation's highways declaring the availability of abortions in the nearest town. A determination that advertising is protected by the First Amendment, however, does not mean that advertising could not be regulated. The principle that all speech can be regulated in some respects has not been seriously disputed since Mr. Justice Holmes asserted that the First Amendment does not protect a person from falsely shouting fire in a crowded theater. *Schenck v. United States*, 249 U.S. 47 (1919). Recognizing that speech can be regulated, this Court recently upheld the constitutionality of an ordinance which excluded political

[15] Virginia has a statute which prohibits "untrue, deceptive or misleading" advertisements. Code of Virginia § 59.1-44 (1973 Replacement Volume).

advertising from the public transit system as a legitimate measure to protect users thereof from "the blare of political propaganda." *Lehman v. City of Shaker Heights, supra*, 94 S.Ct. at 2718.[16] Section 18.1-63 does not, however, seek to regulate the "time, place and manner" of advertisements relating to abortions, but attempts to control the content of those advertisements by prohibiting language which is designed to encourage abortions. As we have noted, prohibiting speech because it advocates unpopular ideas is contrary to the very essence of the First Amendment.

Thus, the Commonwealth of Virginia can accomplish its legitimate interest in protecting the health, safety and welfare of its women with laws which prohibit false and misleading advertising or perhaps even "puffing," but section 18.1-63 is broader than necessary to accomplish this objective and consequently it violates the First Amendment.

[16] Mr. Justice Brennan writing for the four dissenting justices in *Lehman* noted that this Court has "repeatedly recognized the constitutionality of reasonable 'time, place and manner' regulations which are applied in an evenhanded fashion." *Id.* at 2721 (citations omitted). The dissenting justices disagreed with the majority on the issue of whether the law was being applied in an "evenhanded fashion."

CONCLUSION

We respectfully submit that not only is there no legitimate reason for excluding advertising from the First Amendment, but that there are also positive reasons for including it, especially when the advertising conveys information about a constitutionally protected right. Accordingly, the decision of the Supreme Court of Virginia should be reversed and the conviction vacated.

Respectfully submitted,

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September, 1974

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

PUBLIC CITIZEN
1346 Connecticut Avenue NW
Washington, D.C. 20036

HEALTH RESEARCH GROUP
2000 P Street NW
Washington, D.C. 20036

MARYLAND PUBLIC INTEREST RESEARCH GROUP
3800 Greenmount-3
Baltimore, Maryland 21218

PRINCE GEORGE'S COUNTY HEALTH AND WELFARE COUNCIL
9171 Central Avenue
Room 340
Capitol Heights, Maryland 20027

Plaintiffs,

v.

COMMISSION ON MEDICAL DISCIPLINE OF MARYLAND
1211 Cathedral Street
Baltimore, Maryland 21201

ELMER G. LINHARDT

JOHN M. DENNIS

CHARLES BAGLEY

JEROME COLLER

JOHN E. ADAMS

ELI LIPPMAN

CIVIL ACTION NO. 74-568

THREE-JUDGE COURT

KARL F. MECH

WILLIAM G. SPEED III

WILLIAM CARL EBELING

Members, Commission on Medical Discipline of Maryland
1211 Cathedral Street
Baltimore, Maryland 21201

MEDICAL AND CHIRURGICAL FACULTY OF THE STATE OF MARYLAND
1211 Cathedral Street
Baltimore, Maryland 21201

WILLIAM CARL EBELING
President, Medical and Chirurgical Faculty of the State of Maryland
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PRINCE GEORGE'S COUNTY MEDICAL SOCIETY
5801 Annapolis Road, Suite 302
Hyattsville, Maryland 21201

JOHN T. LYNN
President, Prince George's County Medical Society
5801 Annapolis Road, Suite 302
Hyattsville, Maryland 21201

Defendants.

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action seeking to enjoin defendants from enforcing the provisions of Article 43, Section 129 of the Annotated Code of Maryland (1971 Replacement Volume) and Regulation F of the Board of Medical Examiners of Maryland ("Regulation F") insofar as they operate to prevent plaintffs from gathering, receiving and publishing certain factual information about physicians practicing in Prince George's County, Maryland.

2. The value of the amount in controversy exceeds $10,000.

3. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(3).

4. Plaintiff Public citizen is a non-profit public interest organization supported by public donations.

5. Plaintiff Health Research Group is a non-profit public interest organization which is financially supported by plaintiff Public Citizen. It conducts research and issues publications in the area of health care delivery.

6. Plaintiff Maryland Public Interest Research Group ("MaryPIRG") is non-profit public interest organization incorporated in Maryland and supported by students attending Maryland colleges and universities.

7. Plaintiff Prince George's County Health and Welfare Council is a non-profit social service organization, with approximately one hundred and forty members who are residents of Prince George's County, Maryland.

8. Defendant Commission on Medical Discipline of Maryland is charged by Article 43, Section 130(h) of the

Annotated Code of Maryland (1973 Supplement) with regulation of the professional conduct of physicians and is authorized to reprimand, place on probation, suspend, or revoke the license of any physician who violates any statute, rule, or regulation relating to the conduct of a physician, including advertising in violation of Section 129.

9. Defendants Elmer G. Linhardt, John M. Dennis, Charles Bagley, Jerome Collier, John E. Adams, Eli Lippman, Karl F. Mech, William G. Speed III and William Carl Ebeling are the sole members of defendant Commission on Medical Discipline of Maryland. (The individual members of the Commission and the Commission are referred to jointly as the "Commission").

10. Defendant Prince George's County Medical Society is a private, voluntary professional association of physicians practicing in Prince George's County, of which defendant John T. Lynn is president. (The defendant Prince George's County Medical Society and defendant Lynn are referred to jointly as the "County Society"). Defendant Medical and Cirurgical Faculty of the State of Maryland is a private, voluntary professional association of physicians practicing in Maryland, of which defendant William Carl Ebeling is president. (The defendant Medical and Cirurgical Faculty of the State of Maryland and defendant Ebeling are referred to jointly as the "State Faculty"). The County Society and State Faculty are charged by Article 43, Section 130(g) with investigating cases referred to them by the Commission, and defendant State Faculty is also charged by Section 130(g) with initiating investigations and reporting to the Commission cases, *inter alia*, in violation of Section 129.

11. In June 1973, as part of its efforts to assist consumers of medical services, plaintiff Health Research Group began work on a directory that would contain information of interest to consumers relating to all physicians practicing in Prince George's County ("the Directory"). To gather information for the Directory, plaintiff Health Research Group prepared a questionnaire which was to be used to obtain information from each physician regarding, *inter alia*, his office hours, his fees for office visits and certain laboratory tests, whether the physician accepts payment from Medicare and Medicaid, foreign languages spoken, and educational background. (A copy of the questionnaire is attached hereto as Exhibit A). During the week of July 16, 1973, volunteers and employees of plaintiff Health Research Group telephoned the office of each Prince George's County physician and sought to obtain the answers to the questions on Exhibit A from the physician himself or from an assistant. The answers were recorded on the questionnaire, and a copy of the completed questionnaire was mailed to the physician who was asked to verify and, if necessary, correct the information on it.

12. On or about July 19, 1973, defendant County Society sent a notice to each Prince George's County physician warning him that publication of fees and other information in the Directory would constitute advertising in violation of Maryland law.

13. Article 43, Section 129 of the Annotated Code of Maryland provides: "No physician shall advertise except as provided by regulations" of the Maryland State Board of Medical Examiners ("State Board"). Regulation F promulgated by the State Board prohibits all advertising by physicians except the use of personal business cards, change of address notices to bona fide patients, announcements to other physicians of new staff or offices, and small signs outside and on the door of a physician's office.

14. On or about July 31, 1973, defendant County Society sent another memorandum to its members warning that it considered publication of fees and other information in the Directory to be advertising and therefore illegal under Maryland law.

15. On or about August 2, 1973, defendant State Faculty wrote both plaintiff Health Research Group and defendant County Society advising them that its legal counsel had concluded that if a physician permitted the publication in the Directory of any information which he had furnished to the plaintiff Health Research Group, other than his name, specialty, and office hours, he would be advertising in violation of Maryland law.

16. As a result of the above actions of the defendants State Faculty and County Society, many physicians in Prince George's County declined to cooperate with the plaintiff Health Research Group in the publication of the Directory, and others requested that information about them which they or their assistants had previously furnished to plaintiff Health Research Group not be published in the Directory. A further factor in the decision of many of the above physicians not to cooperate or to request that previously furnished information not be included was an awareness on their part that to permit inclusion of information about them in the Directory would subject them to disciplinary proceedings brought by the defendant Commission.

17. On January 17, 1974, plaintiffs Public Citizen and Health Research Group published a partial Directory which together with plaintiff MaryPIRG they are selling to the public at a price which includes only the actual printing cost. Plaintiffs neither have nor will accept or request any consideration from any Prince George's County physician for listing in the Directory.

18. For the reasons set forth in paragraph 15 hereof, the Directory does not contain information on 57% of the Prince George's County physicians. In addition, plaintiff Health Research Group was unable to make contact with another 18% of the Prince George's County physicians, some of whom may also have been unwilling to cooperate with plaintiff Health Research Group for the reasons set forth in paragraph 16 hereof. Consequently, the Directory contains information about only 25% of the Prince George's County physicians.

19. In order to render the Directory more complete and useful to persons who may wish to utilize the services of Prince George's County physicians, plaintiffs Public Citizen, Health Research Group, and MaryPIRG plan to update the Directory and to add information from those physicians who have declined to supply or permit plaintiff Health Research Group to utilize information about their practices because of Section 129, Regulation F, the actions of defendants State Faculty and County Society and the prospect that defendant Commission may seek to discipline them for advertising.

20. Unless enjoined by this Court, the defendants will continue to act or threaten to act in a manner that will preclude plaintiffs from gathering and receiving information from many Prince George's County physicians for publication in a revised Directory. In addition, such actions on the part of defendants will also interfere with the opportunity of persons desiring to utilize the services of physicians practicing in Prince George's County by denying such persons, some of whom are members of plaintiffs MaryPIRG and Prince George's County Health and Welfare Council and supporters of plaintiff Public Citizen, access to information on which to base an informed choice of a physician.

21. The prohibition of advertising imposed by Section 129 and Regulation F and enforced by defendants violates the First Amendment rights:

(a) of plaintiffs to gather and publish factual information concerning physicians practicing in Prince George's County; and

(b) of the members of plaintiffs MaryPIRG and Prince George's County Health and Welfare Council, the supporters of plaintiff Public Citizen, and of other consumers of medical services to receive such information.

22. The actions of defendants described herein in enforcing the prohibition of advertising imposed by Section 129 and Regulation F violate 42 U.S.C. § 1983.

WHEREFORE, plaintiffs pray for an order

(1) convening a three-judge court pursuant to 28 U.S.C. §2284;

(2) declaring that to the extent that Article 43, Section 129 and Regulation F of the Maryland State Board of Medical Examiners prohibit physicians from supplying plaintiffs the answers to the questions contained in Exhibit A for publication in the Directory described herein, they are unconstitutional in violation of the First Amendment;

(3) declaring that to the extent that defendants seek to enforce Article 43, Section 129 and Regulation F to prohibit physicians from supplying plaintiffs the answers to the questions contained in Exhibit A for publication in the Directory described herein, they violate the rights of plaintiffs, under the First Amendment and under 42 U.S.C. §1983;

(4) enjoining defendants, their officers, agents and employees from enforcing the provisions of Article 43, Section 129 and Regulation F insofar as they prohibit any physician from supplying plaintiffs the answers to questions contained in Exhibit A for publication in the Directory;

(5) requiring defendant County Society to send notice to all physicians in Prince George's County informing them that providing plaintiffs with the information sought in Exhibit A for publication in the Directory does not violate any lawful rule, regulation or statute;

(6) granting plaintiffs such other and further relief as may be just and proper including their costs and disbursements in this action.

DATED: Baltimore, Maryland
February 22, 1974

/s/ Raymond T. Bonner
Raymond T. Bonner

/s/ Robert E. McGarrah, Jr.
Robert E. McGarrah, Jr.

/s/ Alan B. Morrison

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EXHIBIT A

PRINCE GEORGE'S COUNTY
DOCTOR QUESTIONNAIRE

Name of Doctor: _____

Name of Interviewer: _____

Contacts: Date _____ Hour _____
_____ _____
_____ _____

Good morning (afternoon, etc.) this is __(your name)__ I am working with the Health Research Group and other Prince George's people to put together a directory of doctors in the County. I'd like to ask you a few questions about Dr. _____.

(If cooperation is refused, tell the person that this is a consumer effort and that their refusal to cooperate will be made public when the directory is published.)

START IMMEDIATELY WITH THE QUESTIONS
(check [/] answers unless otherwise noted)

1. a. Are you a practicing physician? ____Yes ____No
(If "No", terminate questions here).

b. What is your specialty? _____.

2. What type of practice are you engaged in?

____ group practice (a) How many are there in the group? _____
(b) What are their specialties?
_____

____ solo practice

____ other (please specify) _____
_____
_____

3. Do you have any other positions such as teaching, staff appointments or research? ____ Yes ____ No

Specify _____
_____

4. a. From what medical school did you graduate?
_____
In what year? _____

b. What is your education after medical school and internship? (residency, specialty training?)

Type of training	Number of Years

5. Are your Board Certified? ____ Yes ____ No

6. Which hospitals do you primarily use? _____
_____

7. What are the office hours at each of your offices?

Hours	Office Address	Phone Number

8. What is your after hours coverage for:

	None	Answering service	Can be reached at home	Other doctors covering
Weekends:	____	_____	_____	_____
After closing:	____	_____	_____	_____
Vacations:	____	_____	_____	_____

9. How many of the following support personnel do you have in your office?

____ RN (registered nurse) ____ LPN (Licensed practical nurse)
____ medical assistants
____ other (specify) ____ secretaries

_____

10. What is the average waiting time to get a non-emergency appointment? _____ _____Would not answer

11. Will you accept any new patients? ____ Yes ____ No

12. Do you see unscheduled walk-in patients? ___Yes ___No
_____ Only emergencies

13. Do you accept:

	Yes	No	Would Not Answer
Medicare	___	___	___
Medicaid	___	___	___

14. How much time do you allot for each patient, assuming you are not seeing the patient for the first time, or doing a complete physical? _____

15. Can you take care of non-English speaking patients in their own language? ____Yes ____ No
List Languages _____
_____

16. Do you make housecalls? ____Yes ____No

17. How do you inform patients of your fees?
____ available on request
____ patients are informed when they make an appointment
____ patients are informed during the appointment
____ patients are informed when they receive a bill
____ other, specify: _____
_____ would not answer the question

OMITTED FROM PUBLICATION IN THE DIRECTORY

18. Do you require patients to pay your fee at the time of their appointment?

____ Yes ____No ____Would not answer

19. What is your standard fee for:

an initial office visit ____ ____ Would not answer
a routine office visit ____ ____ Would not answer

20. Do you take samples for the following tests in your office?

Test	No	Yes	Price to patient	Would not answer
urinalysis	___	___	_____	___
complete blood count	___	___	_____	___
throat culture	___	___	_____	___
blood sugar (glucose)	___	___	_____	___
Pap smear	___	___	_____	___

21. How much of your practice is:

(a) Self paying? ___None 1/4 ___1/4 1/2 ___ 1/2 3/4
(non Medicaid/Medicare) ___3/4 All
___Would not Answer

OMITTED FROM PUBLICATION IN THE DIRECTORY

(b) Medicaid? ___None 1/4 ___1/4-1/2 ___1/2-3/4
___3/4 All
___Would not Answer

(c) Medicare? ___None 1/4 ___1/4-1/2 ___1/2-3/4
___3/4 All ___Would not Answer

22. Do you prescribe birth control? ___ Yes ___ No

23. Are you currently prescribing

___ Plain Daryon? ___Would not answer
____ Ilosone? ___ Would not answer
____ Ritalin (for hyperactivity)? ___ Would not answer

OMITTED FROM PUBLICATION IN THE DIRECTORY

24. (a) Do you routinely give immunizations?

Adult _____ ____ Yes ____ No

Children _____ ____ Yes ____ No

(b) If yes, specify which immunizations Adults _____

Children _____

25. When a patient makes a complaint about his/her bill or how he or she is being treated, how is it handled?

___ Doctor meets with patients individually

___ Secretary or nurse handles complaints

___ Complaints are referred to medical society

___ Would not answer